STATEMENT OF

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BEFORE THE

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

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Mr. Chairman and Members of the Committee:

Thank you for inviting me to present my views concerning foreign influence factors in security clearance investigations. I have been in the private practice of law for over forty-two years, and I have handled security clearance matters and national security issues since 1978. I am the author of *Security Clearances and the Protection of National Security Information Law and Procedures,* published by the Department of Defense, Personal Security Research Center in 2000. More recently I have published a number of papers dealing with the subject of today's hearing which are appended to my statement. Just a few days ago I published the latest of these studies concerning the decisions of the Appeal Board of the Defense Office of Hearings and Appeals. These are all available on my firm's website: www.sheldoncohen.com.

We are a nation of immigrants and our workforce reflects that. Many of our best scientists and engineers are naturalized Americans. Certainly, our best foreign linguists are those who learned their language as a result of growing up in a foreign country. These first and sometimes second generation Americans will often have immediate family or distant relatives still residing in their countries of origin, and therein lies the problem.

Since 9/11 there has been a marked upturn in security clearance reviews of such people, resulting in clearances being revoked for people who have held them for many years with an unblemished record, or denied to critically needed linguists, particularly Arabic speakers. The magnitude of the problem is difficult to assess because only one agency, the Department of Defense, Defense Office of Hearings and Appeals (DOHA), publishes its decisions, and only in those cases heard by an Administrative Judge or thereafter appealed to the DOHA Appeal Board. These cases are limited to employees of contractors with the Department of Defense. Agencies in the intelligence community such as the CIA, the National Security Agency, the Defense Intelligence Agency, and the FBI do not publish any of their decisions. Also, decisions affecting government employees or applicants for government employment are unavailable as these are decided by agency appeal boards which also do not publish their decisions. Thus, while DOHA may decide a large proportion of the security clearance cases coming before the government, and may be indicative as to what other agencies are doing, such information on the government-wide scope is not publicly available.

Since 9/11, more and more of the cases I have handled before DOHA have dealt with the issues of foreign influence and foreign preference. Because of that, I have done a number of studies to try and discern some policy of the government and the direction it has taken in these cases. The first study I did in 2004, entitled *Foreign Influence and Foreign Preference Considerations in National Security Clearance Decisions*, was of all of the Foreign Influence/Foreign Preference decisions of both the DOHA administrative judges and its Appeal Board's review of those decisions. (Exhibit A). I found that between 60 and 74 percent of applicants raising concerns under Guideline B, Foreign Influence, and

Guideline C, Foreign Preference, were granted clearances by DOHA administrative judges at the initial hearing. Not all of those decisions were appealed, but those appealed by the government generally had multiple negative factors present. I also found that when appealed, the Appeal Board consistently ruled against the applicants. One thing was clear, however, DOHA judges were acting more conservatively in these cases than in the past.

Because I was seeing so many cases involving applicants with contacts with, or relatives in Israel, I did another study focusing on cases concerning only Israel. (Exhibit B). In reviewing all of the cases posted to the DOHA website between 1996 and February, 2006 identifying Israel as the foreign country, the initial decisions of the administrative judges were closely divided. Clearances were granted in 23 cases and denied in 24 cases. Of the 47 cases reviewed, 21 were appealed to the Appeal Board, 14 denials by applicants, and seven, granting clearances, by the government. Of those 21 cases, 19 clearances were denied by the Appeal Board. The two where clearances were affirmed involved applicants who did not have any family ties with Israel, only business connections.

Since the decisions of the DOHA Appeal Board seem to be unusually skewed against the applicant, I did a third study of all of the decisions of the Appeal Board from January 2000 to May 2006. (Exhibit C). Of 898 appeal decisions reported, 798 clearances were denied by the Appeal Board, 35 were granted, and 65 were remanded for further review by the trial judge. That record, in itself, is not surprising since it is to be presumed that trial judges in most cases know the law and will decide the facts in accordance with the law. It is also to be expected, of course, that errors will occur in a small number of cases which is why the judicial process allows for appeals. A closer examination, however, revealed some surprising results that weighed very heavily in favor of the government's

appeal. Of the 745 appeals by applicants of a denial of a clearance, only 6 cases were reversed for a 0.83 percent reversal rate. Of the 111 cases appealed by the government where clearances were granted, 82 were reversed for a 73.9 percent reversal rate.

Even more surprising is the Appeal Board's record in Foreign Influence/Foreign Preference cases. In those cases, in 144 appeals of denials by applicants, the Board affirmed all and reversed none. Of the 49 appeals in such cases by the government granting clearances, the Appeal Board reversed 45 decisions and affirmed four. Two of those four were the cases noted above where the applicants had no family connections to Israel. In the third case, the government did not appeal on the issue of the applicants family ties to South Korea, and in the fourth case, it was the applicant's wife who had relatives in China whom the applicant had never met and with whom he had no contact.

The 45 Foreign Influence/Foreign Preference cases that were reversed were decided by 31 different trial judges. How, one may ask, can 31 experienced trial judges, who presumably know the law and how to apply the facts to the law, be wrong in 92 percent of the cases granting clearances, but right in 100 percent of the cases denying clearances?

The evidence required by the DOHA Appeal Board guarantees that no clearance will ever be approved. It requires the applicant to show that his relatives in a foreign country, regardless of their status, would never in the future be pressured by the foreign government to influence the applicant, even though there is no evidence that the foreign country has ever done that in the past. Clearly, this is an impossible standard that no one can meet.

A number of cases I have handled typify what has been happening since 9/11. In

one case my client, who had held a security clearance for over 30 years with an unblemished record and who made significant contributions to the development of a major weapons system, had his clearance suspended because his parents, then 90 years old, still lived in Lebanon. They had always lived in Lebanon throughout those 30 years which my client had always reported to the government. In his case, after a favorable decision by a DOHA administrative judge, the government did not appeal.

In a similar case, my client, a scientist who had held a security clearance for over 25 years, has his clearance revoked because he had relatives in Iran which he too, had always reported to the government. The administrative judge hearing his case continued his clearance, but the government appealed and, of course, the Appeal Board reversed because my client could not meet its test of proving the impossible.

In a third case my client, who had been conscripted as a young man into the Iranian army during its war with Iraq, had been gassed by Iraq during that war. After his release from the army he fled Iran and cooperated extensively with the CIA to provide information on gas warfare and its effects on him. In return for his assistance, the CIA assisted him in getting preferential consideration for entry to the United States and, ultimately, an early citizenship. Despite that, his clearance was denied because of family still remaining in Iran. Why the government appealed two cases and not the other I do not know.

In another case still pending, my client had fled Iraq in 1980 because, as a Christian, he felt threatened by the regime of Saddam Hussein. In response to a desperate call from the government for Arabic speaking linguists to accompany the troops to Iraq, he traveled as an interpreter and translator with the 82nd Airborne in it initial entry into Iran often coming under hostile fire. Because of his knowledge of the local dialects and idioms he was able

to locate and identify numerous terrorists cells which saved the lives of countless American soldiers. He was so good at it that the American troops nicknamed him "Hunter." Nevertheless, after three years of service in Iraq and later at Guantanamo as an interpreter and translator, his clearance was revoked because he still had a sister and sister-in-law living in Iraq.

It is not known how many such cases there are throughout the government, either of contractor employees or government employees and applicants. It is also not known how many cases which do come before the Department of Defense, DOHA actually takes to adjudication, or what influences DOHA to appeal some initial decisions and not others. What is known is that if a Foreign Influence/Foreign Preference case reaches the DOHA Appeal Board, it will be disapproved. This apparently unwritten policy of the Department of Defense is a trap for the unwary applicant. Whether the three members of the DOHA Appeal Board are acting independently, which seems unlikely, or are acting on direction from higher Department of Defense authority is not known, but if there is such a policy, it should be published to put applicants on notice that if they appeal the denial of the clearance involving a foreign connection, or the government appeals the grant of such a clearance, any hope of success with the Appeal Board is virtually non-existent. If that is **not** the government's position, it should not require the applicant to prove the impossible; that even where there is no evidence that a foreign government has ever pressured a family member to influence an applicant, that it will **not** do so in the future.

While I do not recommend abolishing DOHA or the DOHA Appeal Board, I do suggest that the government either publish its standards so an applicant can know under what circumstances an appeal will be granted or denied. If it is the government's position

that no one with relatives in a foreign country, or a particular country, will get a clearance that too should be published so applicants and the government alike do not waste time on appeals whose outcome is certain.

EXHIBIT A

Publications

FOREIGN INFLUENCE AND FOREIGN PREFERENCE CONSIDERATIONS IN NATIONAL SECURITY CLEARANCE DECISIONS

Sheldon I. Cohen[1]

Introduction

This article examines how the National Security Guidelines for Foreign Influence and Foreign Preference currently being applied in security clearance determinations by the Department of Defense, Defense Office of Heari and Appeals (DOHA). Foreign Influence is a concern that a security risk may exist when an individual's family may subject to duress; Foreign Preference, is a concern that an individual may have a preference for a foreign country over United States. While Foreign Influence and Foreign Preference factors have long been considerations in determir whether to grant a security clearance, recent changes in government policy have caused a heightened concern c unauthorized travel by security clearance holders. This concern requires a reexamination of how these factors are be applied. These changes, along with the current climate of threat to our national security, have resulted in the DO judges acting more conservatively than in the past.

Until March 21, 2000, holding a dual citizenship with the United States and a foreign country, and holding using passports from both countries, did not automatically bar a person from having a security clearance. On March 2000, that changed; thereafter, holding a dual passport became an automatic bar to having a security clearance. W dual citizenship is still not an automatic bar, it is looked at much more closely than before and with considera skepticism. This change in policy has created a particularly acute problem for many individuals who presently have, c the past have held security clearances. Previously it was possible to have dual passports and hold a clearance. N people coming up for a five-year update, or who have left jobs where they held a clearance and are applying for new jo suddenly find themselves losing or being unable to renew their clearance.

Historical Background

During the cold war years of the 1950's through the 1970's, the nation's industrial community expanded to n the government's need for military intelligence and nuclear products. Each government agency at that time developec own requirements and standards for protecting its national security information. In order to standardize the indust security program, uniform adjudicative standards were developed, applicable throughout the government to government agencies.[2] These Uniform Standards were approved by the White House on March 24, 1997.[3]

The Uniform Standards codified, with little change, existing standards for access to classified informa which had been in use in various forms since 1953.[4] Among these are Guideline B, Foreign Influence, and Guidelin

Foreign Preference which are the focus of this article.[5] The earliest version of these Guidelines formulated by Executive Order 10450 in 1953. The Executive Order stated that among the information relevant to security clearance was whether a person was "performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States."[6]

The Security Guidelines

The latest version of Guidelines B and C state:

Guideline B - Foreign Influence[7],

The Concern. A security risk may exist when an individual's immediate family including cohabitants, and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the United States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

Conditions that could raise a security concern and may be disqualifying include:

a. An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

b. Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists;

c. Relatives, cohabitants, or associates who are connected with any foreign government;

d. Failing to report, where required, associations with foreign nationals;

e. Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service;

f. Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;

g. Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure;

h. A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.

Conditions that could mitigate security concerns include:

a. A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;

b. Contacts with foreign citizens are the result of official U.S. Government business;

c. Contact and correspondence with foreign citizens are casual and infrequent;

d. The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons or organizations from a

foreign country;

e. Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

Guideline C - Foreign Preference[8],

The Concern: When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

Conditions that could raise a security concern and may be disqualifying include:

a. The exercise of dual citizenship;
b. Possession and/or use of a foreign passport;
c. Military service or a willingness to bear arms for a foreign country;
d. Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;
e. Residence in a foreign country to meet citizenship requirements;
f. Using foreign citizenship to protect financial or business interests in another country;
g. Seeking or holding political office in the foreign country;
h. Voting in foreign elections; and
I. Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

Conditions that could mitigate security concerns include:

a. Dual citizenship is based solely on parents' citizenship or birth in a foreign country;
b. Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;
c. Activity is sanctioned by the United States;
d. Individual has expressed a willingness to renounce dual citizenship.

Change in Administrative Enforcement Policy

On March 21, 2000, the DOHA Appeal Board affirmed an initial decision granting a clearance to a person hol both dual citizenship and dual U.S. and foreign passports. The basis for the decision was that the applicant's str preference for, and loyalty and allegiance to the United States, and the applicant's unequivocal willingness to renou foreign citizenship were sufficient to overcome the holding a foreign passport.[9] The reaction of the Departmen Defense was immediate.

The following day, the Director of DOHA issued a directive stating "Effective immediately and until fur notice there is an across the board moratorium on the issuance of any decisions in cases involving dual citizen issues."[10] On April 11, 2000, DOHA's Director issued a further directive limiting the moratorium only to "c involving an applicant's use and/or possession of a foreign passport."[11] This was followed on August 16, 2002, b directive from the Assistant Secretary of Defense known as the "ASDC3I Memorandum," or "Money Memorandu prohibiting the granting of a clearance to anyone holding a foreign passport unless approved by a U.S. Governn Agency.[12] The moratorium on hearing cases dealing with passport issues was lifted on September 1, 2000, and si that time no clearances have been granted to anyone holding a foreign passport.[13] The "surrender" of a foreign pass

under the ASDC^{3}I Memorandum is construed to mean that surrender is achieved by returning it to the issu authority, not by giving it to any third party or entity. An offer to turn it in to DOHA or another department of the Un States government, or to place it with the security department of a defense contractor in escrow is not sufficient to sat the terms of the ASDC^{3}I Memo.[14] Merely keeping a foreign passport until it expires also does not satisfy either of two mitigating conditions of the ASDC^{3}I memorandum.[15] Neither an offer to destroy the foreign passport[16], n failure to attempt to locate a missing foreign passport satisfies the requirement of the ASDC^{3}I Memorandum to surrer the passport.[17]

No ban was ever placed on the granting of clearances to holders of dual citizenship, by either the DO Director's moratorium or the ASDC^{3}I Memorandum, and to this day there is no ban.[18]

Decisions of the Defense Office of Hearings and Appeals Administrative Judges

A review of 182 decisions of DOHA administration judges issued from January 1, 2000 to December 4, 2 concerning Foreign Influence (Guideline B) and Foreign Preference (Guideline C) show the following; since August 2000, when an applicant with dual citizenship failed to give up a foreign passport, the applicant was always denie clearance. The holding of dual citizenship alone without a foreign passport, however, has never been a bar to a secu clearance either before or after that date.[19] Dual citizenship is recognized and permitted both by State Departm directives and in the Adjudicator's Desktop Reference issued by the Defense Security Service.[20] Clearances have b granted where there has been prior foreign military service[21], and where there are family ties in foreign countries suc Argentina[22] Australia[23] Bangladesh[24], Canada[25] China[26] Columbia[27], Czechoslovakia[28], Egypt[29] [30], Eri , France[31], Germany[32], Greece[33], Hong Kong[34] Hungary[35], India[36], Iran[37], Israel[38], Italy[39], Jamaica Lebanon[41] Morocco[42] New Zealand[43], Pakistan[44] Peru[45], Philippines[46] Poland[47], Portugal[48], South K [49], Sudan[50], Taiwan[51], Turkey[52], United Kingdom[53], and Yugoslavia[54].

Clearances have been granted where there has been activity in a foreign country such as working[55], having b accounts and financial assets[56], receiving government benefits[57], receiving a foreign military pension[58], voting owning property[60], attending school[61], running a business[62] and paying taxes[63]. In many cases where two or m of the disqualifying factors have been present, they have been deemed sufficiently mitigated to allow a clearance tc granted.[64]

Perhaps more informative than the cases granting security clearances are those cases in which clearances h been denied. Obviously, where a foreign passport is not surrendered, a clearance will not be granted. However, in m cases where it has been surrendered, a clearance has nevertheless been denied. In those cases, among the reasons denying a clearance have been:

- applicant's failure to demonstrate willingness to renounce dual citizenship;[65]
- moving back to a foreign country;[66]
- serving in a foreign military after becoming a United States citizen;[67]
- voting in two foreign elections after becoming a United States citizen;[68]
- unwillingness to bear arms against the applicant's foreign country of origin;[69]
- emotional ties to a foreign country of origin because of religion, family ties and because the country was a refuge the applicant's family after it had been deported;[70]
- problems unrelated to foreign connections such as alcohol abuse,[71] submitting false statements during

investigation,[72] financial irresponsibility,[73] personal misconduct,[74] and conviction of a felony;[75]

- obtaining, renewing or using a foreign passport after becoming a U.S. citizen;[76]
- having substantial financial interests in a foreign country;[77]
- uncertainty as to the foreign family members' connections to the foreign government;[78]
- foreign relatives who have official ties to the foreign government;[79]
- foreign family members being subject to possible coercion by the foreign government;[80]
- foreign family members in countries which are hostile to the United States;[81]
- stated intention to reapply for dual foreign citizenship;[82]
- having close ties to family members living in a foreign country;[83]
- having substantial business contacts with businesses in foreign countries;[84]
- applicant's spouse having foreign family members subject to foreign influence;[85]
- applicant's spouse having not renounced dual citizenship;[86]
- acting as an advocate for a foreign country's interests;[87]
- accepting benefits from a foreign government;[88]
- having intent to renew foreign passport.[89]

DOHA Appeal Board Decisions

All of that is not to say that DOHA will readily grant a clearance, or that relinquishment of a foreign passport automatically guarantee a clearance. In the thirty-two decisions of the DOHA Appeal Board between September 1999, and July 15, 2002, dealing with Foreign Influence or Foreign Preference, the Appeal Board reversed decision the Administrative Judges granting clearances eleven times[90] and affirmed decisions denying clearances twenty tin[91] It remanded one case because the government failed to include a complete copy of a trial exhibit on appeal.[92] Appeal Board's only affirmance of a decision granting a clearance led to an immediate change in government po allowing dual passports.[93]

Certain generalities can be gleaned from the Appeal Board's decisions. Guideline B and Guideline C are limited to unfriendly foreign countries or to those that are hostile to the United States.[94] Assumptions that a frier foreign country does not possess a serious security risk in the context of Guideline B ignores historical reality. Relati between nations can shift sometimes dramatically and unexpectedly; even friendly nations can have profo disagreements with the United States over matters that they view as important to their vital interests or national secu and not all cases of espionage against the United States have involved nations hostile to the United States.[95] E countries friendly to the United States can attempt to gain access to classified information.[96] The fact that the Un States approves or sanctions a project in a foreign country through military aid is not evidence that it sanctions a U citizen's working that foreign project without specific approval.[97]

FOREIGN PASSPORT

Obtaining a foreign passport is an act of exercising the rights and privileges of a citizen of foreign country eve the applicant never uses it.[98] The motivation for obtaining the foreign passport is relevant.[99] Obtaining it to protec

claim rights or privileges afforded a citizen of a foreign county demonstrates a tangible interest in that fore country.[100]

The use of a foreign passport, even if simply for personal convenience, is a declaration to others that the perso a foreign national and shows a preference for a foreign country and indicate ties to a foreign country.[101] Retention use of a foreign passport because a foreign country refuses to recognize renunciation of foreign citizenship wher applicant becomes a naturalized U.S. citizen, and because it will not permit travel to the foreign country without country's passport, is not a mitigating reason to a finding of foreign preference.[102] It is irrelevant that applicant lac knowledge of how seriously the government views the use and possession of a foreign passport with relation to applicant's security eligibility. The security significance of getting and using a foreign passport to travel to a fore country is not diminished merely because it occurred before the applicant got a security clearance.[103]

DUAL CITIZENSHIP

The Appeal Board recognized that although dual citizenship is legal under this country's laws and is recogni by the U.S. Department of State, it does not necessarily follow that the U.S. government has approved or sanctioned c citizenship. It remains a factor in determining foreign preference.[104] State Department guidance that the use c foreign passport by dual nationals does not endanger U.S. citizenship does not address or influence how the use of passport will affect a person's eligibility for a security clearance.[105]

The Appeal Board has held that dual citizenship, standing alone, is not sufficient to warrant an adverse secu clearance decision.[106] However, an administrative judge must still consider the security significance of the o conduct engaged in by the applicant, even if an applicant has returned the foreign passport.[107] An applicant's rec renunciation of foreign citizenship and return of the foreign passport does not automatically guarantee the issuance security clearance. Those actions must be weighed with any other evidence of foreign preference.[108] The Appeal Bc however declined to reverse the denial of a clearance where the only factor was a conditional willingness to renou foreign citizenship even through the applicant never had a foreign passport.[109]

Although an applicant's actions are for personal reasons which do not suggest a sinister motive, that does mean those actions lack negative security significance.[110] That an applicant does not act out of sinister motives does preclude the government from considering other facts and circumstances which may indicate a foreign preference.[1 An applicant's voluntary travel to an unfriendly foreign country, knowing the risks taken each time traveled, ra serious questions of whether the applicant is suitable to be granted a security clearance.[112]

A conditional willingness to renounce foreign citizenship or to give up a passport is entitled to less weight thar unconditional offer to do so,[113] however, the Appeal Board declined to hold that it had no weight.[114] An applic may be allowed to relinquish the foreign passport immediately after the hearing.[115] Reluctance to formally renou foreign citizenship by an applicant is relevant and sheds light on the applicant's motivations.[116]

An expression of antipathy by an applicant to a foreign government rather than its people or culture is not enti to any weight in considering the applicant's reluctance to give up foreign citizenship.[117] What matters is wheth person is vulnerable to foreign influence by a desire to avoid harm to or gain benefit for relatives in a foreign nation.[1 An applicant's compliance with the directions of the foreign country's officials concerning the use of a foreign pass because he was afraid of confronting them over the issue is relevant in considering how the applicant might act if foreign government were to exert influence or pressure on applicant's relative living in the foreign country.[119]

Taking an oath of allegiance upon obtaining U. S. citizenship is not conclusive or dispositive evidence of l

preference.[120] Post-naturalization conduct may be considered in evaluating suitability to hold a clearance.[1 However, an administrative judge may take into account the significance of an applicant's taking the oath of allegianc part of the process of becoming a United States citizen.[122] Applicant's "loyalty" to the United States may not considered in support of either a favorable or an unfavorable determination.[123]

FOREIGN PREFERENCE

Seeking to protect the ability to claim rights and privileges under foreign citizenship, is a demonstration that applicant's interest in foreign citizenship goes beyond mere sentiment, respect for the applicant's foreign heritage symbolism. Once an applicant has expressed a preference for a foreign country, his or her other ties to the fore country are subject to greater scrutiny.[124] Applicant's denial of any preference for a foreign country is relevant but dispositive and must be considered in light of the record as a whole.[125]

A willingness to bear arms for a foreign country demonstrates a willingness to risk life and limb and is str evidence of a profound personal commitment. A person who is willing to bear arms may be willing to perform other which do not entail risk of life and limb to advance the interest and welfare of that country and its armed forces. T raises serious security concerns about an applicant seeking to be granted access to classified information. The U government does not need to risk waiting to see how a person with access to classified information would act if fa with such a quandary in the future. An applicant's statement that he is willing to bear arms for a foreign country, coup with an expressed desire to remain neutral with the United States if it were ever to find itself in conflict with the fore country, raises serious questions about applicant's preferences between the United States and the foreign coun Equivocal preferences with respect to the United States or a foreign country raise serious security concerns under "clearly consistent with the national interest" standard.[126]

An applicant's representation of a foreign country in international sports activities shows a commitment to ac behalf of that country and demonstrates a foreign preference within the meaning of Guideline C. The personal motiva for such actions does not immunize these actions from scrutiny for possible security significance.[127] A fore preference can be shown if an applicant engages in conduct that shows the applicant has an *ad hoc* situational prefere for a foreign country over the United States whenever it suits him.[128] Use of a foreign passport to remove children fi the United States during a custody dispute demonstrates an effort to avoid the lawful jurisdiction of a U.S. cour competent jurisdiction and to seek the protection of a foreign country. Even if it is not likely to be repeated demonstrates foreign preference.[129]

FOREIGN INFLUENCE

Mere possession of family ties with persons in a foreign country is not, as a matter of law, automatic disqualifying under Guideline B. However, it does raise a *prima facie* security concern sufficient to require evidenc rebuttal, extenuation or mitigation sufficient to meet applicant's burden of persuasion.[130] Not only coercive, but i non-coercive influences due to foreign family ties must be considered, such as the possibility of reducing the probabi of threats to family members who might be serving in a foreign country's military.[131]

A differentiation must be made between immediate family members and relatives who are not immediate fam members such as aunts, uncles, cousins and extended family.[132] Unless ties of affection and obligation can be show more distant relatives they cannot be considered as a "foreign influence."[133] The immediate family members applicant's spouse raise security concerns similar to those of applicant's own immediate family members.[134] The that applicant's family members are not members of a foreign government is not dispositive.[135] The secu significance of an applicant's family ties in a foreign country does not turn on the simple question of whether

applicant's relatives have official ties with a foreign government[136]. Even though there is no evidence applicant's relatives are agents of a foreign power, the administrative judge must still consider whether they are position to be exploited by a foreign power.[137]

Of concern is an applicant's spouse not becoming a naturalized U.S. citizen[138], however the expressed inten an applicant's wife to become a naturalized U.S. citizen in the future does not render her current status as a foreign citi irrelevant.[139]

Applicant has the burden of demonstrating that family ties in a foreign country do not place him in a positio vulnerability through possible foreign influence.[140] But there must be evidence in the record that there are close tie foreign family members before the burden shifts to the applicant to show he is not vulnerable.[141] Although applicant's visits to family members in a foreign country may be infrequent, that does not mean that they are casual.[Contact with immediate family members in a foreign country raises a rebuttable presumption that they are not casual.[

BURDEN OF PROOF AND INFERENCES

All conduct must be considered together rather than by a piecemeal approach to get a totality of its secu significance.[144] A judge must make findings and draw inferences and conclusions that reflect a reasona interpretation of the evidence that takes into account the record evidence as a whole.[145] An applicant's motivatio relevant to a security clearance decision, and the applicant's opinions and reaction to the facts can be relevant to extent they are probative of the applicant's motivation.[146] However, an applicant's opinion of the security significa of his or her conduct or circumstances is not dispositive of whether the mitigating conditions should apply.[147]

Security clearance decisions are not limited to consideration of an applicant's conduct and circumstances whil holds a security clearance; prior conduct may be considered.[148] Honesty and candor by the applicant with government weigh in an applicant's favor but do not preclude the government from evaluating the security significanc applicant's answers.[149]

Where a party has the burden of proof on a particular point, the absence of any evidence on that point requires administrative judge to find against that party on that point.[150] The government does not have to offer evide disproving a mitigating condition.[151] An applicant has the burden of presenting evidence to rebut, explain, extenuat mitigate facts admitted by the applicant or proven by the government, and has the ultimate burden of persuasion th favorable security clearance decision is warranted.[152] The fact that more serious conduct is not alleged or found is extenuating or mitigating of the conduct proven or admitted to.[153] A favorable security clearance is not mand merely because an applicant's conduct is not as serious as it possibly could have been.[154] Favorable character evide also does not compel a favorable clearance decision.[155]

An applicant's stated intention about what he or she might do under some hypothetical set of circumstances is entitled to much weight unless the applicant has acted in the past under identical or similar circumstances.[1 Statements by an applicant of his or her intent or state of mind are not binding or conclusive, but must be considere light of the evidence as a whole.[157] The adverse affect an unfavorable security decision might have on an applican the applicant's family is not relevant.[158]

DOHA has no jurisdiction or authority to adjudicate claims under the civil rights statute and claims discrimination against a foreign born applicant will not be considered.[159]

Other Factors Affecting the Outcome of a Case

The outcome of a security clearance determination depends somewhat on the judge to whom it is assigned. Of the seventeen administrative judges issuing decisions during the period reviewed, four stand out from the norm.[160] Most the judges granted between 60 to 74 percent of clearances requested, with between 6 to 25 decisions per judge during t period.[161] In contrast, only 37 percent of Judge Lokey-Anderson's decisions, 44 percent Judge Ross' decisions, 50 percent of Judge Erck's decision and 17 percent of Judge Metz's decisions were favorable to the applicant. At the othe end of the spectrum, 87 percent of Judge Cefola's decisions were favorable to the applicant. While some of this can be attributed to the nature of the cases assigned, (i.e., it is an automatic denial of a clearance if an applicant does not relinquish the foreign passport), other factors solely within the judges' discretion had noticeable differences. For example, applicants' relatives in foreign countries were looked at much more dubiously by judges with low granting ra than by other judges. Also, the country of an applicant's foreign connections appeared to make a significant difference certain cases. While great leeway was given to foreign contacts in countries such as New Zealand, Canada and Great Britain, the same types of family contacts in Israel were considered reason to deny a clearance.[162]

Whether a person had counsel or acted *pro se* does not seem to make a significant difference. Of the decisions reviewed, in 122 cases applicants represented themselves without counsel (pro se). Of these, 56 were grar clearances, resulting in a 46 percent success rate. Of the 60 cases where applicants were represented by counsel, 24 v granted clearances for a 40 percent success rate, not a significant difference. Also noteworthy, where applicants had counsels of record, the applicants were invariably high-level executives. In four of five such cases, the applicant granted a clearance.[163] Multiple counsel seemed to improve the likelihood of success.

Conclusions

Although the DOHA Appeal Board has given numerous reasons for denying a clearance under the Fore Influence and Foreign Preference Guidelines, the fact remains that between 60 and 74 percent of applicants who h engaged in conduct raising concern under these Guidelines have been granted clearances. In those cases where clearar have been denied, or where the Appeal Board has overturned favorable decisions, there were multiple factors or egregi conduct present.

The Uniform Standards for Protecting National Security Information require an examination of the "wl person" -- those factors, both favorable and unfavorable, in a person's life which demonstrate whether the applicant i be believed and trusted.[164] This "whole person concept" requires an examination of the totality of an applica conduct.[165] The Uniform Standards require the Administrative Judge to make a "common sense determination"[166] based on a review of all of the evidence, and, as the Appeal Board has noted, the totality of the evidence must be weig as a whole in reaching a decision.[167]

For almost any single consideration one can find cases both for and against the applicant, and for any combina of factors one can find cases going either way depending on the Administrative Judge who has heard the case. Credibi is important, as is the need for an applicant to provide rebuttal or mitigating evidence on each of the reasons cited to d a clearance.

Not all Administrative Judge decisions are appealed and those which are appealed by the government gener are cases where there have been multiple negative factors present. To date, in those cases, the Appeal Board consistently ruled against the applicant, holding that the Administrative Judge ignored the totality of the evidence. (thing is clear however, under the current climate of threat to our national security, DOHA judges are acting m conservatively in these cases than in the past.

sec.09S

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[1] The author is in the private practice of law in Arlington, Virginia. He is the author of *Secu Clearances and the Protection of National Security Information: Law and Procedures*, 335 pp., published by the Def Personnel Security Research Center, Technical Report 00-4, November, 2000.

[2] S. Cohen, *Security Clearances and the Protection of National Security Information: Law and Proced* Chap. 1, This may be found online at http://stinet.dtic.mil/str/tr4fields.html

[3] 63 Fed. Reg. 4572, Jan. 30, 1998, 32 C.F.R. Part 147.

[4] *Security Clearances and the Protection of National Security Information*, Chap. 1, *supra*, footnote 1.

[5] 32 C.F.R. §§ 147.4 and 147.5.

[6] Executive Order 10450, §8(a)(7), April 7, 1953.

[7] 32 C.F.R. § 147.4.

[8] 32 C.F.R. §147.5.

[9] DOHA ISCR Case No.: 99-0452 (Mar. 21, 2000). Decisions of the DOHA administrative judges and DOHA Appeal Board beginning in the year 1996 may be found at www.defenselink.mil/dodgc/doha/industrial.

[10] See, DOHA ISCR Case No.: 99-0454 (Oct. 17, 2000).

[11] *Ibid.*

[12] On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications Intelligence (ASDC^{3}I) issued a memorandum entitled: "Guidance to DoD Contract Adjudication Facilities (C Clarifying the Application of Foreign Preference Adjudications Guideline" (sometimes referred to as the "ASDC^{3}I me or the "Money memo," named after its author) which prohibited the further issuance of a security clearance to a holde a foreign passport resulting from dual citizenship, "unless the applicant surrenders the foreign passport or obtains off approval for its use from the appropriate agency of the United States Government". DOHA ISCR Case No. 99-0 October 27, 2000. Prior to then security clearances had been allowed for foreign passport holders. DOHA ISCR Case 99-0452, March 21, 2000.

[13] DOHA ISCR Case No.: 99-0454 (Oct. 17, 2002).

[14] DOHA ISCR Case Nos.: 99-0480 (Nov. 20, 2000); 01-01295 (Dec. 13, 2000).

[15] DOHA ISCR Case No.: 99-0009 (Sept. 26, 2001).

[16] DOHA ISCR Case No.: 01-01295 (Dec. 13, 2001).

[17] DOHA ISCR Case No.: 00-0489 (Jan. 10, 2002).

[18] DOHA ISCR Case Nos.: 01-03111 (July 31, 2001); 01-18089 (Apr. 5, 2002).

[19] DOHA ISCR Case Nos.: 99-0009 (Oct. 3, 2000); 99-0030 (Jan. 19, 2000); 99-0452 (March 21, 2C (Appeal Board Decision); 99-0501 (Jan. 12, 2000); 99-0547 (Oct. 10, 1999); 99-0629 (Mar. 21, 2000); 99-0651 (Oc 2000); 99-698 (Aug. 3, 2000); 99-0709 (Oct. 23, 2000); 00-0121 (Feb. 16, 2001); 00-0185 (Mar. 22, 2001); 00-0 (May 24, 2001); 00-0359 (Sept. 26, 2001); 00-0381 (Oct. 21, 2000); 00-0457 (Jan. 23, 2001); 00-0460 (May 15, 20 00-0463 (June 22, 2001); 00-0505 (March 28, 2001); 00-0551 (Feb. 7, 2001); 00-0559 (March 9, 2001); 00-0560 (I 16, 2001); 00-0562 (June 13, 2001); 00-0578 (Mar. 30, 2001); 00-0616 (Feb. 25, 2002); 00-0628 (Sept. 17, 2001); 0629 (March 19, 2001); 00-0673 (Apr. 23, 2001); 00-0757 (June 29, 2001); 01-00849 (April 15, 2002); 01-00951 (. 13, 2001) 01-01192 (Aug. 7, 2001); 01-01864 (Nov. 13, 2001); 01-02081 (Oct. 26, 2001); 01-02948 (Jan. 18, 2002); 03017 (Feb. 21, 2002); 01-03056 (Oct. 9, 2001); 01-03066 (April 20, 2001); 01-03111 (July 31, 2001); 01-03122 (. 27, 2001); 01-03751 (Jan. 29, 2002); 01-04125 (Nov. 30. 2001); 01-05211 (Dec. 14, 2001); 01-05476 (Jan. 17, 2002); 06165 (Aug. 28, 2001); 01-07212 (Dec. 26, 2001); 01-07895 (Feb. 19, 2002); 01-10189 (Dec. 31, 2001); 01-10237 (M 25, 2002); 01-10306 (Dec. 14, 2001); 01-18019 (Apr. 15, 2002); 01-19565 (Mar. 29, 2002).

[20] Available at www.dss.mil/nf/adr/adr1.htm.

[21] DOHA ISCR Case Nos.: 99-0457 (Oct. 11, 1999); 99-0651 (Oct. 3, 2000); 99-0698 (Aug. 3, 2000); 0121 (Feb. 16, 2001); 99-0359 (Sept. 26, 2001); 99-0460 (May 15, 2001); 00-0552 (Mar. 7, 2001); 00-0560 (June 2001); 01-10237 (Mar. 25, 2002); 01-02794 (July 17, 2002); 01-07082 (Mar. 14,2002); and 01-17496 (May 14, 2002);

[22] DOHA ISCR Case No.: 01-10306 (Dec. 14, 2001).

[23] DOHA ISCR Case No.: 01-12961 (Aug. 27, 2002).

[24] DOHA ISCR Case No.: 01-06901 (June 28, 2002).

[25] DOHA ISCR Case Nos.: 99-0527 (Jan. 18, 1999); 01-00849 (April 15, 2002); 01-03056 (Feb. 21, 20 01-03111 (July 31, 2001); 01-16832 (Apr. 25, 2002); 01-19838 (Aug. 19, 2002); 01-19949 (Oct. 30. 2002).

[26] DOHA ISCR Case Nos.: 01-01864 (Nov. 13, 2001); 01-02948 (Jan. 18, 2002); 01-13758 (May

2002); 01-26031 (May 30, 2002)

[27] DOHA ISCR Case No.: 01-06165 (Aug. 28, 2001).

[28] DOHA ISCR Case No.: 01-03017 (Feb. 21, 2002).

[29] DOHA ISCR Case Nos.: 99-0030 (Jan. 19, 2000); 99-0547 (Oct. 11, 1999); 01-16419 (Oct. 2, 2002).

[30] DOHA ISCR Case No.: 01-14041 (Aug. 5, 2002).

[31] DOHA ISCR Case Nos.: 99-0629 (Mar. 21, 2002); 00-0121 (Feb. 16, 2001); 00-0276 (May 24, 20(01-95476 (Jan. 17, 2002); 01-09076 (May 15, 2002).

[32] DOHA ISCR Case Nos.: 01-03122 (July 27, 2001), 01-03751 (Jan. 29, 2002).

[33] DOHA ISCR Case Nos.: 00-0457 (Jan. 23, 2001); 01-18019 (Apr. 15, 2002).

[34] DOHA ISCR Case Nos.: 01-01864 (Nov. 13, 2001); 01-02948 (Jan. 18, 2002); 01-13758 (May 2002); 01-26031 (May 30, 2002).

[35] DOHA ISCR Case No.: 00-0673 (Apr. 23, 2001).

[36] DOHA ISCR Case No.: 01-15345 (Aug. 28, 2002).

[37] DOHA ISCR Case Nos.: 99-0009 (Oct. 3, 2000); 99-0651 (Oct. 3, 2000); 01-12807 (June 17, 2002); 26893 (May 22, 2002).

[38] DOHA ISCR Case No.: 01-17496 (May 14, 2002); ADP Case No. 01-17630 (Aug. 14, 2002).

[39] DOHA ISCR Case Nos.: 99-0698 (Aug. 3, 2002) 00-0359 (Sept. 26, 2001); 00-0629 (Mar. 19, 2001); 05211 (Dec. 14, 2001); 01-07082 (Mar. 14, 2002).

[40] DOHA ISCR Case No.: 01-11007 (April 29, 2002).

[41] DOHA ISCR Case No.: 01-20906 (June 18, 2002).

[42] DOHA ISCR Case No.: 00-0463 (June 22, 2001).

[43] DOHA ISCR Case No.: 01-23911 (Apr. 30, 2002).

[44] DOHA ISCR Case No.: 01-07212 (Dec. 26, 2001).

[45] DOHA ISCR Case No.: 01-08087 (July 23, 2002).

[46] DOHA ISCR Case No.: 01-24043 (May 20, 2002).

[47] DOHA ISCR Case Nos.: 01-20081 (Oct. 18, 2002); 02-03892 (Aug. 26, 2002).

[48] DOHA ISCR Case Nos.: 99-0629 (Mar. 21, 2000); 01-07895 (Feb. 19, 2002).

[49] DOHA ISCR Case No.: 01-19960 (May 20, 2002).

[50] DOHA ISCR Case Nos.: 99-0501 (Jan. 12, 2000).

[51] DOHA ISCR Case Nos.: 01-04125 (Nov. 30, 2001); 01-19565 (Mar. 29, 2002); 01-12250 (May 2002); 01-14862 (Aug. 22, 2002).

[52] DOHA ISCR Case No.: 00-0616 (Feb. 25, 2002).

[53] DOHA ISCR Case Nos.: 99-0709 (Oct. 23, 2000); 01-0551 (Feb. 7, 2001); 01-00951 (Jan. 13, 2001); 02974 (July 17, 2002); 01-06278 (Feb. 28, 2002); 01-22243 (Sept. 11, 2002); 01-22255 (Apr. 24, 2002).

[54] DOHA ISCR Case No.: 02-00317 (July 24, 2002).

[55] DOHA ISCR Case Nos.: 99-0698 (Aug. 3, 2000); 00-0276 (May 24, 2001); 00-0463 (June 22, 2001); 0551(Feb. 7, 2001); 00-0628 (Sept. 17, 2001) (worked and received government health benefits); 00-0673 (Apr. 2001).

[56] DOHA ISCR Case Nos.: 00-0381 (Oct. 21, 2000) (small current bank account); 01-03111 (July 2002); 01-03751 (Jan. 29, 2002); 01-07895 (Feb. 19, 2002) (mortgage and bank account).

[57] DOHA ISCR Case Nos.: 00-0505 (Mar. 28, 2001) (received foreign government allowance w attending U.S. college);

[58] DOHA ISCR Case Nos.: 00-0562 (June 13, 2001); 01-18019 (Apr. 15, 2002)

[59] DOHA ISCR Case Nos.: 01-03066 (Apr. 30, 2001); 01-03111 (July 31, 2001).

[60] DOHA ISCR Case Nos.: 00-0616 (Feb. 25, 2002) (apartment); 01-03017 (Feb. 22, 2002) (building);

04125 (Nov. 30, 2001) (apartment); 01-07895 (Feb. 19, 2002) (apartment); 01-18019 (Apr. 15, 2002).

[61] DOHA ISCR Case Nos.: 01-01864 (Nov. 13, 2001); 01-03111 (July 31, 2001); 01-04125 (Nov. 2001).

[62] DOHA ISCR Case No.: 01-02948 (Jan. 18, 2002).

[63] DOHA ISCR Case No.: 01-02948 (Jan. 18, 2002).

[64] DOHA ISCR Case Nos.: 99-0509 (Jan. 26, 2000); 99-0547 (Oct. 11, 1999); 99-0651 (Oct. 3, 2000); 0698 (Aug. 3, 2000); 99-0709 (Oct. 23, 2000); 00-0121 (Feb. 16, 2001); 00-0276 (May 24, 2001); 00-0359 (Sept. 2001); 00-0381 (Oct. 21, 2000); 00-0460 (May 15, 2001); 00-0463 (June 22, 2001); 00-0505 (Mar. 28, 2001); 00-0 (Feb. 7, 2001); 00-0562 (June 13, 2001); 00-0616 (Feb. 25, 2002); 00-0673 (Apr. 23, 2001); 01-01864 (Nov. 13, 20 01-02948 (Jan. 18, 2002); 01-03017 (Feb. 21, 2002); 01-03111 (July 31, 2001); 01-03751 (Jan. 29, 2002); 01-04 (Nov. 30, 2001); 01-07895 (Feb. 19, 2002); 01-18019 (Apr. 15, 2002).

[65] DOHA ISCR Case No.: 99-0082 (Jan. 3, 2000); DOHA ISCR Case Nos: 00–0018 (Aug. 31, 2000); 0552 (Mar. 7, 2001); 00-0595 (May 10, 2001); 01-13247 (Ap. 12, 2002); 01-16923 (July 25, 2002).

[66] DOHA ISCR Case No.: 99-0509 (Jan. 26, 2000).

[67] DOHA ISCR Case Nos.: 99-0509 (Jan. 26, 2000); 00-0552 (Mar. 7, 2001).

[68] DOHA ISCR Case Nos.: 99-0509 (Jan. 26, 2000); 01-10403 (June 8, 2002).

[69] DOHA ISCR Case No.: 99-0527 (Jan. 18, 1999).

[70] *Ibid.*

[71] DOHA ISCR Case No.: 99-0667 (July 18, 2000).

[72] DOHA ISCR Case Nos..: 00-0050 (Apr. 18, 2001); 01-08324 (Apr. 30, 2001); 01-18860 (Sept. 3, 20 00-0417 (May 1, 2001).

[73] DOHA ISCR Case Nos.: 00-0145 (Aug. 31, 2000); 01-01587 (June 17, 2002); 01-06395 (June 18, 20

[74] DOHA ISCR Case Nos: 01-07053 (Dec. 10, 20021); 01-09305 (Dec. 4, 2001); 01-01587 (June 4, 20 01-18860 (Sept. 30, 2002).

[75] DOHA ISCR Case No: 01-18069 (May 8, 2002).

[76] DOHA ISCR Case Nos.: 99-0057 (Oct. 3, 2000); 00-0018 (Aug. 31, 2000); 01-10288 (Dec. 6, 2001); 02452 (May 15, 2002); 01-06338 (May 16, 2002).

[77] DOHA ISCR Case Nos.: 00-0050 (Apr. 18, 2001); 00-0672 (May 25, 2001); 00-0721 (July 13, 20(01-01587 (June 17, 2002); 01-06338 (May 16, 2002); 01-09389 (May 23, 2002); 01-16923(July 25, 2002); 01-18 (Sept. 30, 2002); 02-00305 (Aug. 8, 2002).

[78] DOHA ISCR Case No.: 00-0145 (Aug. 31, 2000).

[79] DOHA ISCR Case Nos.: 00-0595 (May 10, 2001); 00-0672 (May 25, 2001); 01-07053 (Dec. 10, 20(00-0737 (Sept. 7, 2001).

[80] DOHA ISCR Case Nos.: 00-0674 (Aug. 21, 2001); 01-09305 (Dec. 4, 2001); 01-13274 (Apr. 12, 2002

[81] DOHA ISCR Case No.: 01-07272 (Sept. 28, 2001).

[82] DOHA ISCR Case No.: 01-00962 (Aug. 3, 2001).

[83] DOHA ISCR Case Nos.: 01-00962 (Aug. 3, 2001); 01-01587 (June 17, 2002); 01-16923 (July 25, 20(02-00305 (Aug. 8, 2002); 00-0737 (Sept. 7, 2001).

[84] DOHA ISCR Case No. 01-06626 (Apr. 15, 2002).

[85] DOHA ISCR Case Nos.: 01-02452 (May 15, 2002); 00-0737 (Sept. 7, 2001).

[86] DOHA ISCR Case Nos.: 01-02452 (May 15, 2002); 00-0737 (Sept. 7, 2001).

[87] DOHA ISCR Case No.: 01-10301 (Apr. 8, 2002).

[88] DOHA ISCR Case No.: 01-10403 (June 18, 2002).

[89] DOHA ISCR Case No.: 02-02052 (Oct. 24, 2002).

[90] DOHA ISCR Case Nos.: 98-0052 (Sept. 15, 1999); 99-0254 (Feb. 16, 2000); 99-0295 (Oct. 20, 20(99-0597 (Dec. 13, 2000); 99-0511 (Dec. 19, 2000); 99-0601 (Jan. 30, 2001); 99-0424 (Feb. 8, 2001); 99-0480 (Nov. 2000); 99-0532 (Feb. 27, 2001); 00-0484 (Feb. 1, 2002); 00-0317 (March 29, 2002).

[91] DOHA ISCR Case Nos.: 99-0109 (March 1, 2000); 99-0296 (April, 18, 2000); 99-0454 (Oct. 17, 20(99-0481 (Nov. 29, 2000); 99-0457 (Jan. 3, 2001); 99-0519 (Feb. 23, 2001); 00-0057 (April 4, 2001); 00-0417 (Ma 2001); 00-0051 (July 23, 2001); 00-0737 (Sept. 7, 2001); 00-0009 (Sept. 26, 2001); 01-01295 (Dec. 13, 2001); 00–0

(Dec. 21, 2001); 00-0489 (Jan. 10, 2002); 01-03120 (Feb. 20, 2002); 01-01331 (Feb. 27, 2002); 01-03055 (Ma 21, 2002); 01-00878 (Apr. 15, 2002); 01-00677 (May 21, 2002); 01-04826 (July 15, 2002).

[92] DOHA ISCR Case No.: 00-0628 (Apr. 26, 2002). On remand, clearance was again granted by administrative judge (June 25, 2002).

[93] DOHA ISCR Case No.: 99-0452 (Mar. 21, 2000). See f.n. 9, *supra*.

[94] DOHA ISCR Case No.: 00-0489 (Jan 10, 2002).

[95] DOHA ISCR Case No.: 00-0371 (Mar. 29, 2002).

[96] DOHA ISCR Case No.: 99-0511 (Dec. 19, 2000).

[97] DOHA ISCR Case Nos.: 99-0511 (Sept. 19, 2000); 00-0489 (Jan. 10, 2002).

[98] DOHA ISCR Case No.: 99-0597 (Dec. 13, 2000).

[99] DOHA ISCR Case Nos: 99-0597 (Dec. 13, 2000); 00-0489 (Jan 10, 2002).

[100] DOHA ISCR Case No.: 99-0597 (Dec. 13, 2000).

[101] DOHA ISCR Case Nos.: 99-0252 (Sept. 15, 1999); 99-0295 (Oct. 20, 2000); 99-0424 (Feb. 8, 20 01-01331 (Feb. 27, 2002).

[102] DOHA ISCR Case No.: 99-0519 (Feb. 23, 2001).

[103] DOHA ISCR Case No.: 99-0601 (Jan. 30, 2001).

[104] DOHA ISCR Case No.: 98-0252 (Sept. 15, 1999).

[105] DOHA ISCR Case No.: 99-0424 (Feb. 8, 2001).

[106] DOHA ISCR Case Nos.: 98-0252 (Sept. 15, 1999); 99-0454 (Oct. 17, 2000); 00-0489 (Jan 10, 2002).

[107] DOHA ISCR Case Nos.: 99-0957 (Dec. 13, 2000).

[108] DOHA ISCR Case No.: 99-0424 (Feb. 8, 2001).

[109] DOHA ISCR Case No.: 00-0516 (Dec. 7, 2001).

[110] DOHA ISCR Case Nos.: 99-0454 (Oct. 17, 2000); 99-0424 (Feb. 8, 2002).

[111] DOHA ISCR Case Nos.: 99-0424(Feb. 8, 2001); 99-0597 (Dec. 13, 2000).

[112] DOHA ISCR Case No.: 99-0601 (Jan. 30, 2001).

[113] DOHA ISCR Case Nos.: 99-0252 (Sept. 15, 1999); 99-0254 (Feb. 16, 2000); 99-0295 (Oct. 20, 20
99-0511(Dec. 19, 2000); 00-0515 (Dec. 7, 2001); 99-0601 (Jan. 31, 2002).

[114] DOHA ISCR No.: 99-0601 (Jan. 30. 2001).

[115] DOHA ISCR Case No.: 99-0957 (Dec. 13, 2000).

[116] *Ibid.*

[117] DOHA ISCR Case Nos.: 99-0597 (Dec. 13, 2000); 99-0601 (Jan. 30, 2001).

[118] DOHA ISCR Case No: 99-0601 (Jan. 30, 2000).

[119] DOHA ISCR Case No.: 00-0484 (Feb. 1, 2002).

[120] DOHA ISCR Case, Nos.: 99-0457 (Jan. 3, 2001); 99-0424 (Feb. 8, 2001), 98-0419, (Apr. 30, 1999);
0519 (Feb. 23, 2001).

[121] DOHA ISCR Case Nos.: 99-0424 (Feb. 8, 2002); 99-0519 (Feb. 23, 2001).

[122] DOHA ISCR Case No.: 99-0452 (Mar. 21, 2000).

[123] DOHA ISCR Case Nos.: 99-0597 (Dec. 13, 2000); 99-0532 (Feb. 27, 2002).

[124] DOHA ISCR Case No.: 00-0317 (Mar. 29, 2002).

[125] DOHA ISCR Case No.: 99-0601 (Jan. 30, 2001).

[126] DOHA ISCR Case No.: 00-0317 (Mar. 29, 2002).

[127] DOHA ISCR Case No.: 01-00677 (May 21, 2002).

[128] DOHA ISCR Case No.: 99-0424 (Feb. 8, 2001).

[129] *Ibid.*

[130] DOHA ISCR Case Nos.: 99-0424 (Feb. 8, 2001); 99-0532 (Feb. 27, 2002); 00-0489(Jan 10, 2002); 03120 (Feb. 20, 2002).

[131] DOHA ISCR Case Nos.: 99-0295 (Oct. 20, 2000); 99-0511 (Dec. 19, 200); 99-0601 (June 30, 2001); 0317 (Mar. 29, 2002).

[132] DOHA ISCR Case No.: 01-03120 (Feb. 20, 2002).

[133] *Ibid.*

[134] *Ibid.*

[135] *Ibid.*

[136] DOHA ISCR Case No.: 99-0511 (Dec. 19, 2000).

[137] DOHA ISCR Case No.: 99-0519 (Feb. 23, 2001).

[138] DOHA ISCR Case No.: 99-0511 (Dec. 13, 2000).

[139] DOHA ISCR Case No.: 99-0601 (Jan. 30, 2001).

[140] DOHA ISCR Case, Nos.: 99-0597 (Dec. 13, 2000); 99-0519 (Feb. 23, 2001); 00-0737, (Sept. 7, 20(00-0489 (Jan. 10, 2002); 00-0484 (Feb. 1,2002); 00-03120 (Feb 20, 2002).

[141] DOHA ISCR Case No.: 99-0597 (Dec. 13, 2000).

[142] DOHA ISCR Case No.: 99-0532 (Feb. 27, 2001).

[143] DOHA ISCR Case No.: 00-0484 (Feb. 1, 2002).

[144] DOHA ISCR Case Nos.: 99-0295 (Oct. 20, 2000); 99-0597 (Dec. 20, 2000); 99-0601 (Jan. 30, 2001).

[145] DOHA ISCR Case No: 99-0601 (Jan. 30. 2001).

[146] DOHA ISCR Case No: 99-0551 (Dec. 19, 2000).

[147] DOHA ISCR Case No.: 99-0519 (Feb. 23, 2001).

[148] DOHA ISCR Case No.: 99-0519 (Feb. 23, 2001).

[149] DOHA ISCR Case Nos.: 99-0519 (Feb. 23, 2001); 00-0737 (Sept. 7, 2001).

[150] DOHA ISCR Case No.: 99-0511 (Sept. 19, 2000).

[151] *Ibid.*

[152] DOHA ISCR Case No.: 99-0601 (Jan. 30, 2001).

[153] DOHA ISCR Case Nos.: 99-0601 (Jan. 30, 2001); 99-0424 (Feb. 8, 2001); 99-0532 (Feb. 27, 2001).

[154] DOHA ISCR Case No.: 99-0532 (Feb. 27, 2001).

[155] DOHA ISCR Case No.: 99-0424 (Feb. 8, 2002).

[156] DOHA ISCR Case Nos.: 99-0511 (Dec. 19, 2000); 99-0532 (Feb. 27, 2002); 00-0484 (Feb. 1, 2002).

[157] DOHA ISCR Case No.: 99-0424 (Feb. 8, 2002).

[158] DOHA ISCR Case No.: 99-0480 (Feb. 14, 2001).

[159] DOHA ISCR Case No.: 99-0519 (Feb. 23, 2001).

[160] The administrative judges during the period considered were Braeman, Cefola, Erck, Gales, Hein Kearney, Lokey-Anderson, Mason, Matchinski, Metz, Ross, Sax, Silber, Smith, Testan and Wesley.

[161] Judges Smith and Kearney were not included because they only had two and one decisions respectiv which are not statistically significant.

[162] Compare, DOHA ISCR Case Nos. 00-0460 (United Kingdom, Gales, J.); 01-00849 (Canada, Erck, 01-23911 (New Zealand, Matchinski, J.); and 01-02974 (United Kingdom, Matchinski, J.) with 01-02452 (Isr Matchinski, J.); 01-16247 (Israel, Anderson, J.); 02-00305 (Israel, Anderson, J.); 01-00908 (Israel, Erck, J.).

[163] DOHA ISCR Case Nos.: 99-0757 (June 29, 2001); 01-07212 (Dec. 20, 2001); 01-10306 (Dec. 2001); 01-19949 (Oct. 30, 2002). Clearance was denied in DOHA ISCR Case No. 02-02052 (Oct. 24, 2002).

[164] 32 C.F.R. §147.2(a).

[165] DOHA ISCR Case Nos.: 99-0511 (Dec. 19, 2000); 99-0601 (Jan. 30, 2001);99-0919 (Feb. 23, 2001).

[166] 32 C.F.R. §147.2(c).

[167] DOHA ISCR Case No.: 01-03120 (Feb. 20, 2002).

EXHIBIT B

ISRAEL: FOREIGN PREFERENCE - FOREIGN INFLUENCE CASES, A REVIEW OF DOHA DECISIONS

Sheldon I. Cohen[1]

TABLE OF CONTENTS

I. INTRODUCTION AND OVERVIEW

"Foreign Preference" (Guideline C) and "Foreign Influence" (Guideline B) issues have become an increasingly significant part of the security clearance cases adjudicated by the Defense Office of Hearings and Appeals (DOHA).[2] In a previous article (posted on my website) I examined

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[2] The Defense Office of Hearings and Appeals is a part of the Department of Defense, Office of General Counsel. It adjudicates security clearance issues for employees of government contractors, and renders advisory opinions to Military Departments Clearance Appeal Boards in appeals by U.S. government employees.

DOHA Foreign Preference-Foreign Influence issues involving all countries.[3] While this article focuses on Israel cases, the principles of law and standards of review applied by the DOHA Appeal Board in these cases are equally applicable to applicants with ties to other foreign countries. Because the question of religious bias is sometimes raised in Israel cases, these cases are specifically examined here.

The issues of Foreign Preference and Foreign Influence are particularly acute with applicants who have family members in Israel because they involve not only ties of ethnicity and nationality common to applicants from other countries, but because there are frequently emotional ties due to religion and historic persecution. Also, Israel has highly developed technical and scientific industries, accounting for frequent movement of skilled professionals between Israel and the United States. For perhaps that reason, there appear to be an unusually large number of Israel cases on the DOHA docket.

Since 1996, when DOHA began posting its decisions to its web site, until February 2006, the latest review, there have been 47 cases identifying Israel as the foreign country in question.[4] These cases have resulted in 18 applicants being granted clearances and 29 being denied. There may be more Israel cases than these 47, however, until the Director of DOHA required Administrative Judges to identify the country involved, countries were frequently identified as "Country A," "Country B," etc.[5] Of the 47 cases reviewed, 21 were appealed to the Appeal Board. Fourteen appeals were filed by the applicant and all denials were affirmed by the Appeal Board. Seven decisions granting clearance were appealed by the government; of those, five were reversed by the Appeal Board, and two, the first and the most recent, were affirmed.[6] Thus, Appeal Board's overall record is nineteen to two against applicants who had ties to Israel.

The initial decisions of the Administrative Judges are closely divided: clearances were granted in 23 cases and denied in 24 cases. Of those Judges with more than one Israel decision, Judge Matchinski, who had the most, denied two and granted five applications for clearance; Judge Lokey-Anderson denied four and granted two; Judge Mason granted four and denied none; Judge Young denied three and granted one; Judge Testan denied two and granted one; Judge Wesley

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[3] Foreign influence and Foreign Preference Considerations and National Security Clearances, posted at www.sheldoncohen.com.

[4] www.defenselink.mil/dodgc/doha. Several cases were found on ly by reviewing each of the yearly listing of decisions. They could not be located using the search engine on DOHA's home page. (Eg., ISCR Case Nos. 03-10390 (Apr. 12, 2005); and No. 03-11765 (April 11, 2005)).

[5] Memorandum from Director, DOHA, to Appeal Board and Department Counsel, Oct. 30, 2002.

[6] ISCR Case Nos. 99-0452, (Mar. 21, 2000); 03-11096, (Feb. 3, 2005).

granted two, one of which was reversed, and denied none; Judge Heiney granted two, one of which was reversed, and denied one; Judge Wilmeth denied two and granted none; and Judge Braeman granted one which was reversed, and denied one. The remaining judges each issued only one decision so there is no comparative data for them.

In nine of the cases denying a clearance there were other issues involved, including Guideline E (personal conduct), Guideline J (criminal conduct), and Guideline L (outside activities). In only one Foreign Influence-Foreign Preference case in which another Guideline was involved was a clearance granted, and that decision was one of the two sustained on appeal.[7] Having legal counsel substantially increased the chances of success. In the 20 cases where applicants were represented by counsel, clearances were granted 13 times and denied 7, for a 65 percent success rate. In the 27 cases where applicants represented themselves, clearances were granted 7 times and denied 20, for a 26 percent success rate.

The numbers alone do not tell the whole story, and trying to understand why an administrative judge granted or denied a clearance by examining the facts of each case adds little, because on similar facts the decision went either way. The Appeal Board decisions also shed little light, since an applicant's chance of overturning an unfavorable decision appears nil, while the chance of a favorable clearance decision being upheld on appeal appears only slightly better.

The real decision-making power appears to lie in the hands of Department Counsel, the government's prosecutor, because of the overwhelming record of the Appeal Board's record of granting the government's appeals and denying applicants' appeals. If Department Counsel does not appeal, the applicant will get the clearance, if it does the applicant will not. Accordingly, the methodology used to try to predict an outcome has been to review those cases where there has been a decision favorable to the applicant which the government has not appealed, with those that it has, and to try to glean the difference, if any, in such cases. The documentary evidence offered by Department Counsel in Israel cases has also been reviewed to understand the strategy and tactics used by that office in trying such cases. Applicants' rebuttal evidence to Department Counsel's submissions is also discussed.

II. DOHA APPEAL BOARD DECISIONS

The Appeal Board decisions are here examined to understand the general principles it applies to these cases (as well as cases concerning other countries). In only two Israel cases decided by the Appeal Board which were reviewed, the first, and the most recent, has the Board affirmed the grant of a security clearance. In the first case, Chief Administrative Judge Robert R. Gales made a security determination in favor of the applicant.[8] The applicant, who was born in Israel, became a naturalized citizen of the United States but retained his dual citizenship and his Israeli passport which he used

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7 ISCR Case No. 03-11096 (Feb. 3, 2005)

8 ISCR Case No. 99-0452 (Mar. 21, 2000)

when traveling to Israel. He had a sister living in Israel. Although the applicant expressed a willingness to renounce his dual citizenship, he had not done so because it would "interfere with his ability to interact with his sister." He had also served in the Israeli Army as a young man while an Israeli citizen, and testified that if ordered by Israel to again serve in its military he would refuse to do so, but if the United States ordered him to active duty he would comply.

The government appealed on a number of grounds, among which was that the Administrative Judge failed to give due weight to the security significance of the applicant's obtaining and using a foreign passport after becoming a naturalized U.S. citizen. On March 21, 2000, the Appeal Board affirmed Judge Gales' decision granting a clearance. It held that the applicant's strong preference for, and loyalty and allegiance to the United States, and his unequivocal willingness to renounce foreign citizenship were sufficient to overcome the holding of a foreign passport. The Appeal Board accepted the argument of "legal necessity," i.e., since Israeli law required the use of an Israeli passport by dual citizens to enter the country, a person did not thereby express a foreign preference by respecting the law of the foreign country.

The reaction of the Department of Defense was immediate. The following day, the Director of DOHA issued a Directive stating "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving dual citizenship issues."[9] On April 11, 2000, DOHA's Director issued a further Directive limiting the moratorium only to "cases involving an applicant's use and/or possession of a foreign passport."[10] This was followed on August 16, 2002, by a Directive from Assistant Secretary of Defense, Arthur L. Money, known as the "ASDC^{3}I Memorandum," or the "Money Memorandum," prohibiting the granting of a clearance to anyone holding a foreign passport unless approved by a U.S. Government Agency.[11] The moratorium on hearing cases dealing with passport issues was lifted on September 1, 2000. Since then no one holding a foreign passport has been granted a clearance.[12]

The next two cases to come before the Appeal Board were appeals by the Government of decisions granting a clearance to the applicant. Both were reversed. In the first of these cases, the

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9 See, ISCR Case No. 99-0454 (Oct. 17, 2000).

10 *Ibid.*

11 On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC^{3}I) issued a memorandum entitled: "Guidance to DoD Contract Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudications Guideline," which prohibited the further issuance of a security clearance to a holder of a foreign passport resulting from dual citizenship, "unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." See, ISCR Case No. 99-0454, (Oct. 27, 2000).

12 ISCR Case No. 99-0454 (Oct. 17, 2002).

applicant held dual U.S.-Israel citizenship and had an Israeli passport which he had used a number of times after becoming a U.S. citizen. The initial administrative judge's decision had been decided before the issuance of the "Money" Memorandum.[13] On appeal, the Appeal Board reversed its earlier holding that the use of a foreign passport could be justified due to legal necessity. It held that using a foreign passport for personal convenience *was* evidence of foreign preference, that the "Money" Memorandum overruled the claim of "legal necessity" as a mitigating condition, and that the Memorandum required reversal of the Administrative Judge's decision in favor of the applicant.[14] The Appeal Board further held that while there is no legal requirement to renounce foreign citizenship, "a conditional willingness to renounce foreign citizenship is entitled to less weight than an unconditional willingness to do so."[15] The Appeal Board further held that not only must family ties in a foreign country be considered with respect to possible blackmail, but also with respect to "vulnerability to subtle or noncoercive influence."[16] As an example, the Appeal Board used the hypothetical situation of an applicant being asked to disclose classified information, not for the purpose of harming the United States, but to either increase the security of Israel so his family in Israel could live in peace and safety, or to reduce threats to the lives of Israeli military personnel which might include the applicant's sister and brother. The Appeal Board further noted that, despite there being compulsory military service, even a junior enlisted person could be considered a component of the foreign government.

In that case, the Appeal Board further held that the security significance of the applicant's family ties in a foreign country did not turn simply on whether the applicant's relatives had a job, position or connection with the foreign government, but that an applicant could have strong family ties to relatives in the foreign country even if none of the applicant's relatives had a job, position or official connection with the foreign government. It held that the facts in a case must be considered as a totality, rather than a "piecemeal" analysis. Because the applicant in that case had ties to family members and in-laws living in Israel which were close and continuing, and because he had received his undergraduate education in Israel, had spent 26 years growing up there during his formative years and early adulthood, and because he had served in the Israeli military, the Appeal Board held that all these facts provided "an important context" in which his family ties in Israel had to be considered. In order to be consistent with the "whole person concept," the Appeal Board held it was the totality of facts and circumstances which raised serious questions concerning the security eligibility in that case.[17]

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13 ISCR Case No. 99-0295 (Nov. 16, 1999).

14 ISCR Case No. 99-0295 (Oct. 20, 2000).

15 *Ibid.*

16 *Ibid. Accord*, ISCR Case No. 99-0511 (Dec. 19, 2000).

17 *Ibid.*

In the next Israel case to come before the Appeal Board, (also initially decided prior to the "Money" Memorandum) it again reversed an initial decision granting a clearance.[18] At the administrative hearing, the applicant testified that he had been born and educated in Israel, and had served in the Israeli armed forces as part of his compulsory military duty.[19] After coming to the United States and working for a number of years, he returned to Israel, worked in the Israeli aircraft industry on the Lavi fighter plane which Israel was developing at that time, and later returned to the United States. The applicant testified that he was informed by the Israeli government that he needed an Israeli passport to enter and leave Israel, so he obtained one and traveled on it a number of times after becoming a U.S. citizen. The applicant also testified: "I do not hide my sentiments towards Israel, as I am able to separate them from my obligations to the U.S. and keep them secondary to them. My primary loyalty is to the U.S." The decision reported that he further testified that:

> should he be pressured directly or indirectly through coercion or threats of harm against his family members in Israel - which he discounts as highly unlikely - to reveal United States classified information or otherwise violate security rules, he would refuse to cooperate, he would report the pressure or other threat to his company's security officer and to the FBI, he would renounce his Israeli citizenship and turn back his passport, and complain vociferously to the Israeli authorities, courts, and/or press.

In the initial decision, Administrative Judge Silber noted that the applicant "distinguishe[d] the State of Israel from any government that it may have from time to time, or the demands that the latter may make on him." The Judge held that there was "a broad line distinguishing security significant foreign preference of an applicant, from respect for the land that is a cynosure of his or her religion or for the heritage of his or her national origin." Judge Silber held that this case fell well within the "latter category." Based on all the evidence he granted a clearance.[20]

The Appeal Board reversed, holding that even though the United States supported and sanctioned the production of the Lavi fighter plane, there was no evidence that the U.S. sanctioned the applicant's participation in that project. It rejected the notion that:

> any cooperation between the United States and a foreign country could be cited to justify conduct indicative of the exercise of dual citizenship and foreign preference even if an applicant's conduct was not specifically approved, authorized or consented to or otherwise sanctioned by the federal government.

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18 ISCR Case No. 99-0511 (Dec. 19, 2000).

19 ISCR Case No. 99-0511 (Dec. 30, 1999)(Silber, AJ).

20 *Ibid.*

The Appeal Board held that evidence simply of *any* cooperation between the United States and a foreign country was not enough to warrant mitigation, but that an applicant's conduct had to be specifically approved, authorized and consented to by the Federal government.[21] It further held that applicant's conditional willingness to renounce his Israeli citizenship "is so limited and constrained as to make it extremely unlikely that applicant would ever renounce his [Israeli] citizenship because of his strong ties to [Israel.]" It declined to hold that a conditional willingness to renounce foreign citizenship was entitled to *no* weight, but it refused to allow an Administrative Judge to have "unfettered discretion in deciding what weight to give the evidence."[22] In this case, the Appeal Board held that the expression of conditional willingness was so limited and constrained as to render it essentially insubstantial and entitled to practically no weight.

The Appeal Board further held that even though there was sufficient evidence to conclude that applicant's immediate family members in Israel were not agents of a foreign power, the Administrative Judge erred by limiting his analysis to situations where Israel might try to pressure or influence applicant through threats to his immediate family members. The Appeal Board held that foreign influence is not limited to situations involving coercive means of influence, but also to non-coercive means, noting that even countries friendly to the United States can attempt to gain access to classified information.

With respect to the applicant's statements of what he would do in the future in response to any attempt to exploit his family ties, the Appeal Board held, however sincere or credible, such statements could not be taken simply at face value. An applicant's stated intention about what he or she might do in the future under some hypothetical set of circumstances, the Board said, is merely a statement of intention that is not entitled to much weight "unless there is record evidence that the applicant had in the past acted in an identical or similar manner under identical or similar circumstances." Accordingly, the Appeal Board held that it was arbitrary and capricious for the Administrative Judge to give "great weight" to applicant's statements about what he would do in the future if the Israeli government were to threaten immediate family members in Israel.

The Appeal Board further held that applicant's testimony that he was unaware of the security implications of his conduct, i.e., his using a foreign passport, was not negated merely because he acted out of ignorance of the legal implications or complications of his voluntary actions. "An individual's good intentions do not trump the negative security implications of conduct or circumstances indicative of foreign influence or foreign preference."

The Appeal Board substituted its own judgement for that of the Administrative Judge in what it considered to be a reasonable weighing of the evidence. Despite a long line of Appeal Board decisions giving deference to an Administrative Judge's discretion weigh favorable and unfavorable evidence, the Appeal Board overruled the Administrative Judge's favorable determination, holding

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21 ISCR Case No. 99-0511, at p. 5 (Dec. 19, 2000).

22 *Id* at p. 7.

that the unfavorable evidence outweighed the favorable evidence.[23] It reasoned that is because the

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[23] In ISCR Case No. 02-30373 (Nov. 1, 2004), the Appeal Board has defined its standard of review as follows:

"When the rulings or conclusions of an Administrative Judge are challenged, the Board must consider whether they are: (1) arbitrary or capricious; or (2) contrary to law. . . . In deciding whether the Judge's rulings or conclusions are arbitrary or capricious, the Board will review the Judge's decision to determine whether: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion. . . .

"When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge." . . . The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings, and whether the Judge's findings reflect a reasonable interpretation of the record evidence as a whole. Although a Judge's credibility determination is not immune from review, the party challenging a Judge's credibility determination has a heavy burden on appeal.

"When an appeal issue raises a question of law, the Board's scope of review is plenary. . . . If an appealing party demonstrates factual or legal error, then the Board must consider the following questions: Is the error harmful or harmless? . . .; Has the non-appealing party made a persuasive argument for how the Administrative Judge's decision can be affirmed on alternate grounds? . . .; and if the Administrative Judge's decision cannot be affirmed, should the case be reversed or remanded?

The Appeal Board has held in other cases that it reviews the Administrative Judge's decision in its entirety, not just isolated sentences, to discern what the judge found and concluded. (ISCR No. 01-03107 at p. 5 (Aug 27,2002)). It held that the Administrative Judge is not measured against a standard of perfection (Eg., ISCR No. 01-025452 at p. 10 (Nov. 21, 2002); ISCR No. 01-01642 at p. 4 (June 14, 2002)), that the Administrative Judge's decision must be a common sense determination (Eg. ISCR No. 97-0765 at p. 7 (Dec, 1, 1998); ISCR No. 97-0627 at p. 7 (Aug. 17, 1998)), that there is a rebuttable presumption that the Administrative Judge considered all of the evidence in the record unless the Judge specifically states otherwise (Eg., ISCR No. 01-19879 at p. 2 (Oct. 29, 2002); ISCR No. O1-10301 at p. 3 (Dec. 31, 2002)),
(continued...)

applicant had strong, long-term ties to Israel, engaged in acts of dual citizenship after he became a naturalized U.S. citizen, returned to Israel to work on Israeli projects for personal reasons without his conduct being sanctioned by the U.S. Government, was married to an Israeli citizen who had not become naturalized, had immediate family members in Israel, and possessed and used an Israeli passport after becoming a naturalized U.S. citizen, that the *totality* of such evidence failed to be sufficiently mitigating to warrant granting him a clearance.

The next Israel case to come before the Appeal Board was from a decision against the applicant.[24] Clearance was denied because the applicant had used his Israeli passport numerous times after becoming an American citizen, and had not surrendered it by the time of the hearing. The Denial was sustained on appeal, the Appeal Board rejecting the applicant's request to have the case remanded so he could address the reason for the rejection.[25] The Appeal Board held that destroying a passport, placing it in escrow with the security department of the defense contractor or giving it to DOHA or another government department did not meet the requirements of the Money memo.

In the next Administrative Judge's decision granting a clearance to be appealed by the Government, the Appeal Board once again reversed.[26] In that case the applicant, an Israeli by birth, became a naturalized U.S. citizen but did not renounce his Israeli citizenship. He had immediate family who were citizens and residents of Israel, and a son who had dual U.S./Israeli citizenship. The applicant testified that while he would not want to take up arms for the U.S. against Israel in a hypothetical conflict, he could not conceive of the U.S. and Israel ever being adversaries of each other. He said he would not take up arms against the U.S. for Israel, and would defend U.S. interests whenever he was called upon. Applicant said only if Israel were not in a confrontation or conflict with the U.S. would he be willing to take up arms for Israel.

(...continued)
and that credibility determinations are entitled to deference on appeal (Eg, ISCR 01-02677 at p. 4 (Oct. 17, 2002); ISCR No. 00-0713 at p. 3 Feb. 15, 2002)).

The Appeal Board has further held that an Administrative Judge's decision can be arbitrary and capricious if it: does not examine relevant evidence; fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; does not consider relevant factors; reflects a clear error of judgment; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or is so implausible that it cannot be ascribed to a mere difference of opinion. (ISCR Case No. 00-0317 at p. 5, n. 9 (March 29, 2001)).

[24] ISCR No. 01-01295 (Sept. 9, 2001) (Braeman, AJ).

[25] ISCR No. 01-01295 (Dec. 13, 2001).

[26] ISCR Case No. 00-0317 (Oct. 31, 2001) (Wesley, AJ).

The Administrative Judge found that although applicant hedged on his willingness to take up arms for the U.S. against his native Israel, that was not enough to create an indicia of preference for his birth country. He wrote, "Americans are steeped in their ethnic roots with countries other than the U.S. and can be expected to harbor varying degrees of pride for the countries of their parents. Love of ethnic roots is not, by itself, a disqualifying preference . . .." The Administrative Judge noted that Israel is not considered historically to be a hostile country and "has a considerable history of stable, democratic institutions and no corresponding history of exerting pressure or influence to compromise the security interests of the U.S." The Administrative Judge found that applicant's immediate family members in Israel were neither agents of a foreign power nor in a position to be exploited.

The Appeal Board reversed, holding that given applicant's statements that he would be willing to bear arms for Israel, it was arbitrary and capricious for the Administrative Judge not to apply the disqualifying condition.[27] It stated:

> The willingness to bear arms for a country is strong evidence of a profound, deeply personal commitment to the interests and welfare of that country. A person who is willing to bear arms for a country may be willing to perform other acts (which do not entail risking life and limb) to advance the interests of that country. Accordingly, the willingness to bear arms for a foreign country raises serious security concerns.

This willingness to bear arms, the Appeal Board held,

> indicated a profound, deeply personal commitment to the interests and welfare of the foreign country and could place a person in a serious quandary if the country wished access to U.S. classified information that it believes would be necessary or desirable for its national security, but which the United States declined to share with the foreign country.

The Appeal Board ruled the Government need not take the risk of waiting to see how a person with access to classified information would act if faced with such a quandary at some future time. It further held that the Judge's failure to take this into consideration was "particularly troubling," given the applicant's statement that he would want to be neutral if the United States were ever to find itself in conflict with Israel. Such equivocal preferences, it said, with respect to the United States or a foreign country raises serious security concerns. The Appeal Board further criticized the Administrative Judge for failing to consider the applicant's potential vulnerability to noncoercive means of influence through his family members. This, it held, must be subject to greater scrutiny once the applicant has expressed a preference for the foreign country.

The Appeal Board rejected the Administrative Judge's assumption that Israel did not pose a serious security risk because it was a country friendly to the U.S. It held that such a view ignores

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[27] ISCR Case No. 00-0317 (Mar. 29, 2002).

the historic reality that relations between nations can shift, and that even friendly nations can have profound disagreements with the United States over matters which they view as important to their vital interests or national security. It noted that "not all cases of espionage against the United States have involved nations that were hostile to the United States."

The next Administrative Judge's decision granting a clearance to be reversed concerned an applicant who had previously held dual U.S.-Israeli citizenship, but who had surrendered her Israeli passport and renounced her Israeli citizenship.[28] The applicant had a sister, brother-in-law, mother-in-law and a niece living in Israel. When asked how she would react if her family members were ever threatened, she stated she did not know what she would do. The Administrative Judge held that "not knowing does not mean she would choose to go against the U.S." He found that the applicant's uncertainty was not unique to relatives living abroad, as he could see such a threat occurring to anyone living anywhere.

The Appeal Board once again reversed.[29] It held that even though applicant's family members were not agents of Israel, that was not dispositive of whether they were in a position to be exploited. It rejected applicant's argument that the government's position was predicated on a hypothetical situation, one involving a possible Israeli threat to exploit her family members in Israel. The Board held that it was entirely appropriate for the Department Counsel to argue the possibility of vulnerability of coercion, and that the Government need not wait until a person actually mishandles or fails to safeguard classification before it can deny or revoke access.

What apparently influenced the Appeal Board's decision was applicant's acknowledgment that she was unsure of what she would do if her family members were threatened. The Appeal Board, without explanation, said simply that the applicant has "a heavy burden of persuasion to demonstrate that she is not at risk of being vulnerable to her family ties in Israel," and that given the evidence in that case, the Administrative Judge was "arbitrary and capricious" in the ruling in applicant's favor.

Administrative Judge Braeman was again reversed in another Israel decision in which she granted a clearance.[30] Applicant had married four times, and his past and present wives were dual citizens of the U.S. and Israel, the U.K. and Poland. His children and step-children were dual citizens of the U.S., Israel, Poland and France. He also had not renounced his Israeli citizenship or relinquished his Israeli passport until shortly before the hearing when he learned that having them was a problem. The Administrative judge ruled in favor of the applicant because "there was a dearth of evidence concerning whether the relatives were in a position to be exploited."

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[28] ISCR Case No. 01-17496 (May 14, 2002) (Heiney, AJ).

[29] ISCR Case No. 01-17496 (Oct. 28, 2002).

[30] ISCR No. 03-11765 (Oct. 14, 2004) (Braeman, AJ) This case cannot be found using the DOHA web page search engine, but was found by using its yearly listing. See f.n. 3, above.

The Appeal Board again reversed, holding that the Administrative Judge had erred in putting the burden of proof on the government to show that there was a likelihood of foreign influence, rather than on the applicant to show that there was not.[31] However, the Appeal Board did reject the Department Counsel's argument that consideration should *not* be given to applicant's renunciation of his Israeli citizenship and cancellation of his passport simply because it had not occurred until shortly before the hearing. It held that there is no time element imputed to the requirements of the "Money Memorandum," which is silent on when an applicant must surrender a foreign passport.

The Appeal Board once again, in this case, used its over-arching fact-finding powers to hold that the "application of the Adjudicative Guidelines is not left to the "unfettered discretion" of the Administrative Judges, but rather requires the exercise of sound judgment within the parameters set by the Directive."[32] (Although all of the Appeal Board judges had previously been DOHA administrative Judges, they appear to believe that their promotion has given them greater sound judgment than they had before.)

Five years after its first affirmance of a favorable Israel decision, the Appeal Board finally affirmed another favorable decision. In that case the applicant was a fifty-seven year old retired U.S. Air Force Lieutenant Colonel who had been highly decorated during his combat career. While in the Air Force he was in charge of military sales to Israel. Upon his retirement, and with the approval of the U.S. Air Force, he obtained employment with the Israeli Ministry of Defense to provide the Israelis with advice on managing their foreign military sales program. As part of that employment the applicant had extensive contacts with the Israeli Mission and attended embassy parties. Subsequently, he began employment with a private pro-Israel organization whose mission was to strengthen relations between the U.S. and Israel. He served as the Director of Defense Policy for that organization and lobbied Congress on behalf of the organization for a provision that was later enacted into U.S. law. One of applicant's character witnesses was the former Director of the Defense Security Service. The Administrative Judge held that the work that applicant did for Israel after he retired was activity sanctioned by the United States, and although it was on behalf of the Israelis, it was in furtherance of strategic U.S. interests and in the best interest of the United States. Because of the applicant's outstanding military record and the outstanding military record of his witnesses, under the totality of the circumstances, the Administrative Judge ruled in his favor.[33]

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[31] ISCR No. 03-11765 (Apr. 11, 2005)

[32] The Appeal Board has frequently stated that an Administrative Judge does not have "unfettered discretion", while never defining what that is. Eg., ISCR Case No. 01-27371, at p. 2 (Feb. 19, 2003); ISCR Case No. 02-29608, at p. 3 (Dec. 17, 2003); ISCR Case No. 03-02486 at p. 3 (Aug. 31, 2004).

[33] ISCR Case No. 03-11096 (May 14, 2004)(Lazzaro, AJ).

On appeal, Department Counsel argued that there was a "foreign financial interest" when applicant was paid by an American company which had military sales to Israel.[34] The Board rejected this argument as well as Department Counsel's remaining argument that the decision was not supported by a totality of the evidence. The Appeal Board considered the "totality" argument as simply asking it to make a *de novo* review of the evidence which it declined to do. Comparing this case with the other Israel cases with similar facts which the Appeal Board reversed, one can only conclude that the applicant's outstanding war record as a highly decorated Air Force Officer made the difference.

The remaining fourteen cases concerning Israeli contacts that were appealed, were all denials of a security clearance by the Administrative Judge.[35] All denials were affirmed. Five cases were, predictably, denied because they involved other disqualifying factors in addition to Israel connections. In one of those cases, the applicant had significant business connections with foreign companies involving defense related technology, raising the issue of outside employment under Guideline L.[36] In that case, the Appeal Board agreed that applicant's development of the technology, while unclassified, could have defense uses, and that it was possible that applicant's contacts in Israel who had formerly been high-level members of the Israeli military were agents of Israel.[37]

In another case, the applicant was found to have falsified his security clearance application by failing to disclose that he had dual citizenship and a dual passport, and failing to list all of his foreign travel. While the Administrative Judge found in favor of the applicant on Foreign Preference, he found that the applicant had intentionally falsified his security clearance application and found against him for personal misconduct under Guideline E.[38] The Appeal Board affirmed.[39]

In another case which was appealed, the Administrative Judge found that the applicant, who was born and educated in Israel, had worked for a defense laboratory run by the Israeli Ministry of

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[34] ISCR Case No. 03-11096 (Feb. 3, 2005).

[35] ISCR Case Nos. 01-06266 (Sept. 23, 2002); 01-02452 (Nov. 21, 2002); 01-01295 (Dec. 13, 2002); 02-00305 (Feb. 12, 2003); 01-22606 (June 30, 2003); 02-04344 (Sept. 15, 2003); 02-06928 (Sept. 17, 2003); 01-22693 (Sept. 22, 2003); 01-10349 (Feb 15, 2005); 02-12760 (Feb. 18, 2005); 03-04090 (Mar. 3, 2005); 02-24942 (Mar. 3, 2005); 02-17178 (Apr. 5, 2005); and 03-10390 (Apr. 12, 2005).

[36] ISCR Case No. 01-06266 (Apr. 15, 2002)(Matchinski, AJ).

[37] ISCR Case No. 01-06266 (Sept. 23, 2002).

[38] ISCR Case No. 02-04344 (May 29, 2003)(Anderson, AJ).

[39] ISCR Case No. 02-04344 (Sept. 15, 2003).

Defense.[40] When traveling outside of Israel he was expected to collect information and technology to bring back to the laboratory. After being educated in the U.S. he went back to Israel where he was offered a job which he declined after concluding he was being recruited by an Israeli intelligence organization. Applicant's mother and sister-in-law were residents and citizens of Israel. Since coming to the U.S. in 1989, applicant had been regularly contacted by members of Israeli intelligence serving at the Israeli Embassy asking about any contacts who might be trying to obtain information about his work for the defense laboratory in Israel. Applicant cooperated with these visits because he did not want anything to happen to his mother in Israel, but testified that he told the Israeli intelligence people that he would no longer permit those contacts. He said he permitted these contacts because he felt bound not to disclose classified information obtained while working for the Israeli defense laboratory. He did not disclose to the U.S. Government the nature of his classified work for Israel.

Although applicant renounced his Israeli citizenship and surrendered his Israeli passport, he had earlier used his Israeli passport to travel to the U.S. after acquiring U.S. citizenship. The Administrative Judge held that Israel, although a strategic partner with the U.S., frequently pursues foreign policy objectives contrary to U.S. interests, has multiple active and effective intelligence services that target U.S. intelligence and economic information, and operates against the citizens in the U.S. The AJ held that he was not convinced that the applicant was not an Israeli intelligence officer.

On appeal the Appeal Board affirmed the initial decision, rejecting the applicant's arguments that the record evidence did not support the AJ's findings and that the AJ was biased.[41] The Board did find that the AJ drew improper inferences because there was no evidence to support the inference that applicant was a security risk because he was not given a "clean bill of health" after a counterintelligence investigation. The Board further held that the AJ committed "clear error" in stating that he was not satisfied that applicant was not an Israeli intelligence officer, because: (a) there was no allegation in the Statement of Reasons that he was then or in the past ever an Israeli intelligence agent; (b) the government produced no evidence to support such a finding, and; (c) the applicant was not obligated to present evidence disproving an allegation that was not made against him in the SOR. Nevertheless, the Appeal Board affirmed the AJ's decision because it held there was sufficient other evidence to support it.

The remaining seven clearance denials appealed by the applicants were all limited to Foreign Influence-Foreign Preference considerations. All were affirmed by the Appeal Board. In the first of these cases the applicant was a dual citizen of Israel and the United States.[42] Although born in the United States, his family had moved to Israel when he was two years old and he was raised and

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40 ISCR Case No. 01-10349 (July 4, 2004)(Metz, AJ).

41 ISCR Case No. 01-10349 (Feb. 15, 2005).

42 ISCR Case No. 02-00305 (Aug. 8, 2002) (Anderson, AJ).

educated there. While still a citizen of the United States, he voted in Israeli elections, served in the Israeli Air Force and held a Secret security clearance issued by the Israeli government. The applicant married an Israeli citizen, and he and his wife owned an apartment in Israel worth about $170,000 which they rented out. He had used his Israeli passport to enter and exit Israel during his travels there. His father, mother, brother, and in-laws were all citizens and residents of Israel and he maintained close contacts with his family. The Administrative Judge concluded that applicant's foreign contacts had a direct and negative impact on his suitability to hold a clearance, and that his significant assets in Israel were also a factor.

On appeal, the applicant argued that the Administrative Judge failed to consider or give sufficient weight to the evidence, or to give due consideration to applicant's surrendering his Israeli passport two weeks before the Hearing. He said that it went "well beyond the realm of absurd" for him to sever all contact with his parents. The Appeal Board rejected these arguments and affirmed the Administrative Judge's decision.[43]

The Appeal Board's next affirmance of a denial involved an applicant who was a dual U.S./Israeli citizen who, although born in the U.S., was raised in Israel from the age of one to the age of twenty-eight.[44] He had substantial inherited property in Israel, his mother and sister were dual citizens, and his in-laws still lived in Israel. He used his Israeli passport after having been issued a U.S. passport to enter and exit Israel because he believed that Israeli law required it. At the time of the hearing, he no longer had the Israeli passport. The applicant stated he would be willing to bear arms for Israel if there were to be some "terrible holocaust," but would not bear arms simply if Israel were in a war. He stated he would never take up arms against the U.S. and would take up arms for the U.S. against Israel if that should ever occur. The Administrative Judge found that applicant's contacts could not be considered casual or infrequent, and found against him.

On appeal, given the evidence in the record, the Appeal Board found that it was reasonable for the Administrative Judge to conclude that applicant's ties with his immediate family members in Israel raised security concerns which the applicant failed to mitigate.[45] It held that applicant's past use of an Israeli passport did not become irrelevant simply because he surrendered it four days prior to the hearing. The board held that past use could be considered for its security significance to show past and present ties with Israel. The Appeal Board further held that applicant's stated intention to renounce his Israeli citizenship after resolution of the inheritance issues garnered little or no weight, since "a promise or offer to take action in the future does not constitute evidence of reform, rehabilitation or changed circumstances."

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43 ISCR Case No. 02-00305 (Feb. 12, 2003).

44 ISCR Case No. 01-22606 (Jan. 29, 2003)(Heiney, AJ).

45 ISCR Case No. 01-22606 (June 30, 2003).

In the third affirmance by the Appeal Board, the applicant, who was born in the United States, had moved to Israel in 1976 with his wife and two young children.[46] Thereafter, he became an Israeli citizen, served in the Israeli armed forces and worked for fourteen years at an Israeli defense contractor that had a relationship with the Israeli government. Upon retirement he returned to the United States where he lived since. Applicant's father and sister both continued to live in Israel. The Administrative Judge ruled that, although applicant's return to the United States in 1996 might have established that he had a clear and unequivocal preference to the United States, his continuing ties to Israel in the form of his Israeli citizenship and a "not so insignificant" pension from the Israeli defense contractor, left unclear his preference.

The Appeal Board affirmed, holding that although applicant's decision to keep his pension to secure his senior years was a personal one, nevertheless, the U.S. government could consider that as a factor in determining whether to grant a clearance.[47] The Appeal Board held that the Administrative Judge had decided the case correctly considering the totality of circumstances.

In the fourth case where the Appeal Board affirmed a denial of a clearance, the applicant had acquired his Israeli citizenship through his parents when they emigrated to Israel in 1948, although they returned to the United States after twelve years due to economic hardship.[48] The applicant became a naturalized citizen of the United States in 1969, but in 1981 obtained an Israeli passport which he used to return to Israel where he worked for the Israeli Ministry of Defense for a year. Applicant's brother, brother-in-law and sister-in-law were citizens of Israel residing in Israel. He had fifteen nieces and nephews and two children in Israel, and considered himself very close to his family in Israel. Because of Applicant's close family ties, clearance was denied by the Administrative Judge.

On appeal the applicant argued that there was a distinction between the State of Israel and Israel as the Holy Land.[49] The Appeal Board found that argument unpersuasive, holding that foreign influence is not limited to a consideration of influence which might be brought to bear by a foreign government, but also applies to situations that do not involve a foreign government. It held:

> The distinction between an applicant's feelings toward the government of a foreign [country] and the people and culture of a foreign country does not have much practical meaning or significance under Guideline B. The mere fact that applicant has expressed antipathy toward the [foreign country's] government is not dispositive under Guideline B. A person can be vulnerable to foreign influence without having

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46 ISCR Case No. 02-06928 (June 25, 2003) (Testan, AJ).

47 ISCR Case No. 02-06928 (Sept. 17, 2003).

48 ISCR Case No. 01-22693 (Feb. 13, 2003) (Anderson, AJ).

49 ISCR Case No. 01-22693 (Sept. 22, 2003).

any positive or favorable feelings toward the government of a particular foreign country.

The Appeal Board further held that although applicant was an Israeli citizen solely because of the citizenship of his parents, the Administrative Judge properly considered his exercise of the rights and privileges of citizenship when he used an Israeli passport as an adult, as well as his work for an Israeli defense contractor after becoming a naturalized U.S. citizen.

The next Appeal Board affirmance of a denial involved an applicant who was taken to Israel by his parents at age five, and who, after completing his compulsory Israeli military obligation, worked in the Israeli defense contracting industry where he had an Israeli Top Secret clearance.[50] His daughter, parents and in-laws were citizens of and resided in Israel. His spouse, although residing in the U.S., had not applied for U.S. citizenship.

The Appeal Board, after reviewing the evidence, rejected applicant's argument that the Administrative Judge's decision was arbitrary or capricious and that the Judge did not consider the facts consistent with the "whole person concept."[51] However, the Board held that the Administrate Judge erred when she drew adverse inferences from the applicant's statement that he would consider lobbying his congressman if U.S. policies towards Israel posed a threat to his relatives in Israel, but that the error did not warrant reversal or remand. The Board held that the exercise of the right under the First Amendment of the U.S. Constitution to petition congress does not raise a security concern.

The remaining eight cases contain essentially a repetition of the reasoning of the earlier ones.[52]

The Appeal Board has never explained how it distinguishes cases of applicants with family members living in a foreign country who do get a clearance, with those in the same situation who do not. It offers no explanation of its distinction between friendly and unfriendly foreign nations except to say that for unfriendly countries there is a "heavy" burden of persuasion.[53] The only conclusion to be drawn from reading the Appeal Board decisions is that there is no discernable logic as to why a clearance will be granted in one case but not another except that the Appeal Board will

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50 ISCR Case No. 01-02452 (May 15, 2002) (Matchinski, AJ).

51 ISCR Case No. 01-02452 (Nov. 21, 2002).

52 ISCR Case Nos. 02-00305 (Feb. 12, 2003); 01-22606 (June 30, 2003); 02-04344 (Sept. 15, 2003); 01-10349 (Feb 15, 2005); 02-12760 (Feb. 18, 2005); 03-04090 (Mar. 3, 2005); 02-24942 (Mar. 3, 2005); 02-17178 (Apr. 5, 2005); 03-10390 (Apr. 12, 2005).

53 ISCR Case No. 01-26893, at p. 10 (Oct. 16, 2002); ISCR Case No. 02-04768, at p. 3 (June 27, 2003).

affirm all denials and reverse all grants except if the case is so compelling, that it could not withstand public criticism for its decision.

III. ADMINISTRATIVE JUDGE DECISIONS NOT APPEALED BY DEPARTMENT COUNSEL

Because the Appeal Board has affirmed all denials and reversed all but two grants of a clearance, the real decision making power lies in the hands of Department Counsel, the prosecutor in these cases.[54] If there is a favorable decision and Department Counsel appeals, the decision will

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[54] The lack of precedential value of one Administrative Judge's decision on another Administrative Judge has been discussed by the Appeal Board. In one case, the applicant argued that the Administrative Judge's decision was arbitrary, capricious and contrary to the law because it differed from decisions by other Administrative Judges which had granted clearances to applicants with ties to Israel. The Appeal Board's answer was that decisions of the Hearing Office Administrative Judges were not legally binding precedent on other Hearing Office Judges, or legally binding on the Appeal Board. It held that even if the Appeal Board concluded that the Administrative Judge's decision in that particular case was not consistent with decisions by his colleagues in other DOHA cases, that conclusion would not require the Appeal Board to hold the Judge's decision in that case to be arbitrary, capricious, or contrary to law. ISCR Case No. 01-22606, at p. 4-5 (Dec. 30, 2003).

Because the decisions of Hearing Office Judges are not considered legally binding precedents in other cases, the Appeal Board held, neither an Administrative Judge nor the Appeal Board was required to distinguish other Administrative Judge's decisions, or justify why they were not considered or to be persuasive authority. The Appeal Board has held that it has no obligation to insure consistency in Administrative Judge's decisions, even on identical facts or contradictory rulings concerning the same evidence in different cases. ISCR Case No. 02-00318 (Feb. 25, 2004).

In a recent Appeal Board decision involving an applicant from Pakistan, clearance had been denied by the Administrative Judge. On appeal, the applicant argued that there were other decisions granting clearances to applicants from Pakistan, and as well as other cases involving similar issues from other countries, and that to allow some, while denying others on the same facts was arbitrary and capricious. The Appeal Board held that applicant offered no cogent reason why the Board should follow one set of hearing office decisions over another. It rejected "applicant's assertion that the Board is obligated to ensure some level of consistency with respect to the conclusions of the Administrative Judges." The Appeal Board held that under DOD Directive 5220.6, it:

> did not have general supervisory jurisdiction over Hearing Office Judges. . . . Moreover the Board does not have jurisdiction or authority to review hearing office decisions that have not been appealed, and even when hearing office decisions are appealed, the Directive limits the Board to consideration of the

(continued...)

almost always be reversed. Of the 23 Administrative Judge decisions granting clearances, seven were appealed by Department Counsel and 16 were not. The 16 that were not appealed spanned from January 18, 1999 to January 31, 2006.[55] (Only six administrative judge decisions were prior to the September 11, 2001, attack on the World Trade Center.) It is important to examine the 16 favorable decisions to see what, if anything, distinguishes them from the eight favorable cases that Department Counsel *did* appeal. It is also important to compare these 16 cases to those initial denials that were not appealed to determine what facts were influential on the Administrative Judges' decisions.

A. Decisions Granting Clearances Which Were Not Appealed by Department Counsel

Case No. 1.[56] In the first case decided before the "Money" Memorandum, the applicant, who was born in Israel and served mandatory military service there, emigrated to the United States in 1968, became naturalized in 1973, and subsequently traveled to Israel with his family on his U.S. passport. His elderly mother to whom he sent money monthly lived in Israel. On arriving in Israel, because he was an Israeli by birth, he was required to obtain an Israeli passport to leave the country which he later used on a number of occasions to enter and leave Israel. Though stating that he was willing to renounce his dual citizenship, the applicant subsequently maintained both dual citizenship and dual passports. Clearance was granted and not appealed. The remaining 14 cases were subsequent to September 11, 2001 and subsequent to the Money Memorandum which prohibited the holding of dual passports.

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[54](...continued)
material issues raised by the parties. . . . Accordingly, findings and conclusions in the Judge's decision that are not challenged on appeal are not proper subjects for review by the Board. In view of the foregoing, it is neither legally required under the Directive, nor practicable for the Board to undertake the task applicant asks it to assume. ISCR Case No. 02-29403, p. 6, f.n.14 (Dec. 14, 2004).

The Appeal Board confuses "supervisory jurisdiction" over Administrative Judges, with its own requirement that Administrative Judges follow the Appeal Board's decisions as precedent in future case. Its position that it has no obligation to insure consistency is, itself, inconsistent with its position that its rulings are binding precedent.

[55] ISCR Case No. 99-0062 (Sept. 15, 1999); ADP Case No. 01-17630 (Aug. 19, 2002); ISCR Case No. 01-23975 (Dec. 31, 2002); 02-09944 (Jan. 23, 2003); 01-16440 (Feb. 13, 2003); 02-27067 (Jul. 11, 2003); 02-30071 (Jul. 28, 2003); 02-04398 (Aug. 12, 2003); 01-17669 (Nov. 12, 2003); 02-18095 (Dec. 17, 2003); 02-24074 (Jan. 29, 2004); 02-11872 (Jan. 30, 2004); 02-14006 (Feb. 17, 2004); 02-30301 (Apr. 13, 2004); and 02-28320 (Mar.10, 2005).

[56] ISCR Case No. 99-0062 (Sept. 15, 1999) (Matchinski, AJ).

Case No. 2.[57] The next case involved an applicant who was born in Israel and had emigrated to the United States to pursue his post-graduate education. After becoming a U.S. citizen he used his Israeli passport when traveling to Israel which was required by the Government of Israel for persons holding Israeli citizenship. Applicant's mother, sister and uncle were citizens and residents of Israel with whom applicant maintained regular contact. He had four childhood friends in Israel with whom he had regular contact. None of his immediate or extended family had any connection with the Israeli government. The applicant had taken steps to renounce his Israeli citizenship but had not completed the process by the time of the hearing. Before the close of the hearing he documented his surrender of his passport to the Israeli embassy. He held no property or financial interest in Israel and had not accepted any benefits from Israel since becoming a U.S. citizen. Clearance was granted and not appealed.

Case No. 3.[58] Applicant, who was born in U.S., was the beneficiary of a trust that included real estate in Israel which, if sold, would net him approximately $200,000. This represented 18% of applicant's net worth. He had no other contacts with Israel. Although the Administrative Judge found that applicant's foreign financial interest was "substantial," and that "Israel is a nation that targets U.S. technology for espionage," the Judge found that the applicant's financial interest in Israel would not make him vulnerable to foreign influence and granted the clearance. The decision was not appealed.

Case No. 4.[59] Applicant was a dual citizen of the United Kingdom and the United States. His parents who were 78 and 80 years of age emigrated to Israel from England after they retired and lived in Israel. Applicant's sister also lived in Israel. Applicant obtained a U.K. passport after he became a U.S. citizen but later relinquished it. He occasionally visited his elderly parents and his sister in Israel. Applicant had two children born in the United States and made no effort to obtain Israeli citizenship for them. Clearance was granted and not appealed.

Case No. 5.[60] Applicant was a dual citizen of Israel and the United States. Although born in Cyprus, he was then taken to Israel by his parents when he was ten days old. Upon completing two years of college in Israel, he moved to the United States for better opportunities and completed his education in this country. After becoming a United States citizen, applicant traveled to Israel using his Israeli passport five times, stating that he only used it as a necessity to gain entry to Israel. He renewed the Israeli passport again after it expired, however after being informed of the "Money Memorandum," he surrendered it to his employer's security department where it was locked in a safe. The passport had expired and was no longer valid. Applicant's renunciation of his Israeli

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57 ADP Case No. 01-17630 (Aug. 19, 2002) (Wesley, AJ).

58 ISCR Case No. 01-23975 (Dec. 31, 2002) (Young, AJ).

59 ISCR Case No. 02-09944 (Jan. 23, 2003) (Matchinski, AJ).

60 ISCR Case No. 01-16440 (Feb. 13, 2003) (Anderson, AJ).

citizenship was pending. His wife, also a dual citizen, had a sister, several cousins and an aunt in Israel with whom she had little contact. Applicant maintained casual contact with several childhood friends in Israel with whom he exchanged emails once a month. Clearance was granted and not appealed.

Case No. 6.[61] Applicant, who was born in Israel, completed college there and then entered the Israel military where he served for five years. Thereafter, he moved to the United States to attend graduate school and subsequently became a U.S. citizen. He had a sister who resided in Israel but did not work for the Israeli government. He also had a small retirement account in Israel of less than $5,000. The applicant had submitted all of the required paperwork to renounce his Israeli citizenship and had returned his Israeli passport. He also had a brother who was a citizen of the U.K. The Administrative Judge found that there was no evidence that any of the immediate family members were connected with the Israel or U.K. military or intelligence services, and that "it is highly unlikely that Israel or the U.K., close allies of the United States, would risk threatening their relationships with the United States by exploiting their private citizens for the purpose of forcing a United States citizen to betray the United States." The Judge further held that the applicant, "through his actions and deeds, made it clear that he is grateful to have been given the opportunity to become a United States citizen and that the United States is his home." Clearance was granted and not appealed.

Case No. 7.[62] The applicant, born in Israel, served in the Israeli Army prior to emigrating to the United States and becoming a U.S. citizen. On the several occasions when he visited Israel he was required to use his Israeli passport to enter Israel because Israel still considered him to be a dual national. However by the time of the hearing, he had surrendered his Israeli passport to the Israeli consulate and had taken steps to begin the renunciation of his citizenship. Applicant's brother was a citizen and resident of Israel who was employed as bus driver. Applicant owned an apartment jointly with his brother, his half-interest being worth about $50,000, which he intended to transfer to his brother. His net worth in the United States was over $1 million. The Administrative Judge found the applicant's financial interest in Israel to be minimal, that the brother was not connected with the government, and that there was no evidence that the brother's presence in Israel could be exploited. The Judge also found that "it would be unlikely that the applicant would ever consider any such attempt at exploitation. The applicant would reject any such pressure to violate U.S. security interests." Clearance was granted and not appealed.

Case No. 8.[63] Applicant was a citizen of Morocco of Jewish ancestry who received his secondary school education in Israel. He had relatives in France, Columbia, Hong Kong, and Spain. His graduate studies at a preeminent technological university in Israel were sponsored by a public Israeli aeronautics firm. Applicant's only contact with Israel at the time of the hearing was his

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61 ISCR Case No. 02-27067 (July 11, 2003) (Testan, AJ).

62 ISCR Case No. 02-30071 (July 28, 2003) (Cefola, AJ).

63 ISCR Case No. 02-04398 (Aug. 12, 2003) (Matchinski, AJ).

elderly grandmother living there who had emigrated from Morocco because it had become increasingly inhospitable for its Jewish citizens. The grandmother lived in a retirement home and had never worked in Israel. Applicant spoke to her about once every three months and had visited her in the two years prior to the hearing. Applicant renounced his Moroccan citizenship. U.S. government officials testified that he had made substantial contributions to the U.S. interests. Clearance was granted and not appealed.

Case No. 9.[64] Applicant, a 69-year old engineer, was born and educated in the United States, had worked for the same defense contractor since 1972, served on active duty in the U.S. Navy from 1956 to 1959 and on inactive duty from 1959 to 1964, and had held a security clearance since 1972. His daughter, who was born in the U.S., moved with her husband to Israel in 1981 where she then lived with their five children. She was a psychologist employed in a government military hospital. Applicant's first grandson was then performing compulsory military duty in the Israeli Navy. His son-in-law had become a judge in Israel which required him to relinquish his U.S. citizenship. Applicant testified that any threat to his daughter would make him grieve, but that was true no matter where his daughter lived. He said any parent would respond in such a way, but that had not affected his loyalty to the United States in the past twenty years that his daughter's family had lived in Israel. The Administrative Judge found that although none of applicant's family were agents of Israel, they were all in position to be influenced by Israel. He further found that "applicant's emotional ties were to the land and not to the Israeli government." He found that although applicant said that a threat to his daughter was of concern and he would grieve, because applicant had a long record since 1972 of holding a clearance without any security violations, and because his family had been in Israel since 1981, the Judge's "predictive judgment" was that applicant would execute his security responsibilities in the future as he had since 1972, by reporting any coercive or noncoercive foreign influence. Applicant's long record of holding a security clearance and his service in the U.S. military without any blemish appeared to sway the balance in his favor. Clearance was granted and not appealed.

Case No. 10.[65] Applicant who was born in the United States, traveled to Israel at age of nineteen and stayed there for five years. During that period he became an Israeli citizen and served in the Israeli military. He later returned to the United States with his Israeli-born wife who by then had acquired dual U.S.-Israeli citizenship. Applicant's wife's parents and siblings still resided in and were citizens of Israel, although none had any connection with the Israeli government. Applicant had no contact with his in-laws except to answer the phone when they called his wife. He had renounced his dual Israeli citizenship and returned his Israeli passport. The Administrative Judge concluded that applicant had limited emotional attachment to his wife's family members in Israel. Because applicant had renounced his Israeli citizenship, returned his Israeli passport, and had subsequently come to the United States and raised a family, the judge found that overcame any

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64 ISCR Case No. 01-17669 (Nov. 12, 2003) (Mason, AJ).

65 ISCR Case No. 02-18095 (Dec. 17, 2003) (Mogul, AJ).

concern of dual loyalty resulting from of his going to Israel when he was twenty-one years old. Clearance was granted and not appealed.

Case No. 11.[66] Applicant was born in Israel and after fulfilling his required military service came to the United States, became naturalized, married a U.S. citizen and raised a family in the U.S. He used his Israeli passport when traveling to Israel after becoming a U.S. citizen. In order to qualify for a security clearance, applicant renounced his Israeli citizenship and gave up his Israeli passport. Applicant's mother and nine siblings were residents of Israel. One sibling was an office worker for the Israeli government, but his mother and the other eight siblings did not work for the Israeli government and were not agents of the government. The Administrative Judge found that the jobs of the siblings "did not place them in a position to be exploited by a foreign power in a way that could force applicant to choose between [them] and the U.S." Although applicant continued to use his Israeli passport after receiving his U.S. citizenship, those concerns were mitigated because "applicant did not know his possession and use of his Israeli passport would have a negative impact on his application for security clearance." Because his mother was 69 years of age, and had always been a housewife raising children, the Administrative Judge found that common sense indicated "that she is not in a position to be exploited by a foreign power to force applicant to choose between his loyalty to his mother and his loyalty to the U.S." Influential in this case was applicant's "sound ties to the U.S.," including raising his family and renouncing his Israeli citizenship. Clearance was granted and not appealed.

Case No. 12.[67] Applicant was born and raised in the United States. In 1974 at the age of twenty he traveled to Israel, volunteered on a communal settlement, and began studying religion at a Jewish institute of higher learning. In May 1976, he returned to the U.S. to marry. Both he and his wife went to Israel in 1976 and until 1986 resided in Israel and voted in elections. As a result of living there, he was registered for the military service but never served. He returned to the United States to avoid the possibility of having to serve in the Israeli Army. Applicant renounced his Israeli citizenship and returned his Israeli passport. He has no relatives living in Israel, although his wife and children remained dual citizens of U.S. and Israel. Clearance was granted and not appealed.

Case No. 13.[68] Applicant was born in the U.S. His parents, who were retired, and his brother, sister and sister-in-law were dual citizens of the United States residing in Israel but were not connected with the government or were agents of Israel. Applicant maintained regular contact with his parents, but had irregular contacts with his siblings. He had made a number of trips to Israel for business or pleasure. Applicant's brother, sister and sister-in-law all worked in private industry in Israel. The AJ found that applicant's siblings were not "in a position to be taken advantage of in a way that forces applicant to choose between them and the U.S." Applicant had strong ties to the U.S.,

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66 ISCR Case No. 02-24074 (Jan. 29, 2004) (Mason, AJ).

67 ISCR Case No. 02-11872 (Jan. 30, 2004) (Heiney, AJ).

68 ISCR Case No. 02-14006 (Feb. 17, 2004) (Mason, AJ).

both he and his wife were native born U.S. citizens and they had four children born in the U.S. Applicant obtained all of his education and training primarily in the U.S. except for ten months in Israel. He had worked for the same U.S. defense contractor for more than twenty-three years and had held a security clearance for more than twenty years. Applicant has no property in Israel. Clearance was granted and not appealed.

Case No. 14.[69] Applicant, who was born and educated in the United States, moved to Israel intending to stay for only two years to complete his higher education. He met his wife in Israel, married and remained there for ten years, working and voting in Israel. After ten years, applicant returned with his family to the United States. He applied to have his Israeli citizenship revoked and surrendered his Israeli passport. Applicant's father-in-law, sister-in-law and brother-in-law were residents and citizens of Israel. He had little or no contact with them. None were agents of, or associated with the Israeli government. Applicant's remaining assets in Israel were in the process of being sold, after which he would have no financial interest there. The AJ found that although applicant had family in Israel, "he indicates that he has no ties of affection or obligation to anyone in Israel, thus he has no foreign ties or contacts who could potentially influence him." Clearance was granted and not appealed.

Case No. 15.[70] Applicant, who was born in the U.S., was taken to Israel by his parents at the age of seven and acquired dual Israeli citizenship by operation of law. He returned to the U.S. with his parents and completed high school here but later returned to Israel to complete his military obligation to avoid criminal prosecution had he failed to do so. Upon completion of his military duty applicant returned to the U.S., completed his education and married a native born U.S. citizen. The first time applicant returned to Israel he used his U.S. passport but was told that in the future he would have to enter Israel on an Israeli passport. He returned to Israel a number of times thereafter for vacation and to visit his family using his Israeli passport. Following his interview with the Defense Security Service, and on the advise of his legal counsel, he cut up his Israeli passport and returned it to the Israeli embassy notifying the Embassy that he irrevocably revoked his Israeli citizenship. Applicant's parents and sister lived in the U.S. but he had a brother living in Israel who did not want to leave so long as his spouse's parents who also lived there were alive. His brother worked for a private investment firm and was still in the Israel Reserves. Applicant stood to inherit a one-third of an apartment valued at from $200 thousand to $250 thousand which his brother lived in. Clearance was granted and not appealed.

Case No. 16.[71] Applicant was born, raised and educated in the United States. After completing his education he worked for the U.S. Navy and later the U.S. Army in a civilian capacity for 10 years holding a security clearance during that time. Applicant met his wife, an Israeli citizen,

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69 ISCR Case No. 02-30301 (Apr. 13, 2004) (Anderson, AJ).

70 ISCR Case No. 02-28320 (Mar. 10, 2005) (Matchinski, AJ).

71 ISCR Case No. 04-11605 (Jan. 31. 2006) (Marshall, AJ).

while she was visiting in the United States. After they married they made annual trips to Israel to visit his wife's family and family friends.

Because applicant's wife wanted to be near her family, in 1998 applicant obtained a job with an Israeli company and he and his family moved to Israel and he and the children became Israeli citizens. After two years his company transferred his job back to the United States and the family returned deciding that it would be better for the children to live in the U.S. permanently given that the Israeli peace process was not going well. Prior to the hearing applicant renounced his Israeli citizenship and returned his Israeli passport to the Embassy of Israel. Applicant and his family continued to make annual trips to Israel to visit with his in-laws. Clearance was granted and not appealed.

B. Decisions Denying Clearances Which Not Appealed by the Applicant.

There were ten cases decided between January 18, 1999 and January 12, 2005 in which clearances were denied and not appealed. These were examined to determine what, if anything, differentiated them from the cases where clearances were granted and not appealed.

Case No. 1.[72] Applicant and his family were deported to Israel in 1951 from a hostile middle eastern country. Later he emigrated to Canada and then to the U.S. where he has lived with his wife and children for the preceding ten years. He declined to renounce his Israeli citizenship because he was entitled to pension benefits. He also declined to give up his Israeli passport, which he renewed periodically, because it facilitated his travel to Israel to visit his elderly mother and handicapped brother. (This case was prior to the Money Memorandum which requires relinquishment of a foreign passport). In response the question of a possible war between the United States and Israel, applicant said that he would not bear arms against his mother, brother and sister. The AJ found that in viewing the totality of the evidence, the applicant "indicated some ambivalence about his commitment to the U.S. and what is his own best interests as a seeker of a security clearance."

Case No. 2.[73] Applicant, a native born Israeli, was unwilling to renounce his dual citizenship or to turn in his Israeli passport.

Case No. 3.[74] Applicant, a retired U.S. federal government employee, had his security clearance suspended and later revoked while he was a senior level government director in foreign military sales. It was alleged that he had repeatedly showed bias and favoritism toward Israel in his official involvement with Israeli foreign military purchases, and that he had given favorable treatment

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72 ISCR Case No. 99-0527 (Jan. 18, 1999) (Sax, AJ).

73 ISCR Case No. 01-00908 (Jan. 31, 2002) (Erck, AJ).

74 ISCR Case No. 01-10301 (Apr. 8, 2002) (Smith, AJ).

to Israel while representing the United States in the area of foreign military sales. Applicant's denial of having received the notice of the earlier revocation of his clearance was disbelieved by the AJ. Clearance was denied because it had been previously revoked on the grounds that applicant had willingly served the interests of another government by being its advocate in foreign military sales.

Case No. 4.[75] Applicant was born and raised in Israel and moved to the United States at age twenty-one. After becoming a United States citizen she renewed her Israeli passport which she declined to return because she felt she needed it to enter and leave Israel to avoid paying the Israeli exit tax. Applicant had a mother, brother and two sisters who were citizens and residents of Israel, although none worked for the Israeli government or were agents of the government. Clearance was denied because the AJ held that applicant failed to show that her family ties did not create a potential for influence and compromise of classified information and, also based on the Money Memorandum, because applicant would not relinquish her Israeli passport.

Case No. 5.[76] Applicant who was born in Israel, lived in the United States for forty years. After becoming a U.S. citizen he renewed his Israeli passport several times and used it to enter and exit Israel on numerous occasions. He did not want to renounce his Israeli citizenship. In his statement he said he "had emotional and religious allegiance to Israel." He testified that his allegiance was "mainly to the United States." Although the applicant's Israeli passport had expired after he was advised of the Money Memorandum, the AJ held that that did not rule out his future renewal of his Israeli passport.

Case No. 6.[77] Applicant, a naturalized U.S. citizen, declined to renounce his dual citizenship or to give up his Israeli passport. He had close family members in Israel and had substantial business with the Israeli government and military. The Administrative Judge held that while his relationships did not affect his right to hold U.S. citizenship, they were "too extensive and material to ignore when considering him for access to classified information."

Case No. 7.[78] Applicant, a naturalized U.S. citizen, had a brother and sister who were citizens and residents of Israel; his brother was a computer technician and his sister was a housewife. The Administrative Judge found that "The Israeli government is actively engaged in military and industrial espionage in the United States. An Israeli citizen working in the U.S. who has access to proprietary information is likely to be a target of such espionage." (The AJ cited two government exhibits to support his statement but did not describe what they were). The AJ further held, with respect to applicant's brother and sister, that "despite the fact that Israel is actively engaged in espionage against

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75 ISCR Case No. 01-16247 (Apr. 12, 2002) (Anderson, AJ).

76 ISCR Case No. 01-13693 (Dec. 20, 2002) (Testan, AJ).

77 ISCR Case No. 01-22696 (Jul. 25, 2003) (Sax, AJ).

78 ISCR Case No. 02-27647 (Sept. 15, 2003) (Wilmeth, AJ).

the United States, it has a democratic form of government. There is no evidence that Israel would exploit its own citizens in an effort to further the goals of its espionage." Thus, the applicant's immediate family concern was mitigated. Although applicant had applied to renounce his Israeli citizenship, he still maintained his Israeli passport which he had used continuously for the twenty-five years that he had been a U.S. citizen. His continued possession of his Israeli passport was the reason his clearance was denied.

Case No. 8.[79] Applicant immigrated from Russia and became a U.S. citizen in 1983. He developed two contacts in Israel and contacts with two Russian Jews in an effort to develop a private business venture of trading in computer equipment. Applicant admitted to making false statements on a business visa application regarding his contacts. He also gave incomplete and inaccurate information on his Security Clearance Applicant (SF-86) and in three subsequent interviews concerning his job, passport and foreign friends and reasons. The Administrative Judge ruled that applicant's withholding of information and his omissions appeared to be knowing, willful and deliberate, and found against him under Guidelines B, E and J for falsification of statements.

Case No. 9.[80] Applicant, of Druze heritage, although born in the U.S., was taken to Lebanon by his parents and received his early education there. His father continued to reside in Lebanon, his mother having moved back to the U.S. Applicant returned to the U.S., finished high school and then served in the U.S. Air force for 13 years during which he held a Top Secret, SCI clearance for much of that period. He has a older sister who is a U.S. citizen who met a Lebanese poet while on a visit to her parents, married him and now lives in Lebanon. He also had a younger sister living in the U.S., and a brother who moved to Israel, converted to Judaism, married an Israeli woman and was a staunch Zionist. Applicant had no direct contact with his brother for about six years. His wife's parents continued to reside in Lebanon. Applicant stood to inherit a small house in Lebanon worth about $20,000. Although applicant's financial interest was not substantial, the Judge concluded that owning a house in Lebanon still had significance in evaluating the case.

Although the main concern in this case was Lebanon, there was also concern with the brother's contacts in Israel. The Administrative Judge found with respect to Israel, that "Israel is known to target for collection U.S. classified information." The AJ, although not asked by Department Counsel to take administrative notice, justified his going outside of the administrative record for support of these statements by saying "these facts are known to this agency through its cumulative expertise in deciding security-clearances [sic] cases involving foreign influence or foreign preference," (citing ISCR Case No. 99-00452, at page 4 (Mar. 21, 2000)).[81]

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[79] ISCR Case No. 01-19372 (Apr. 26, 2004) (Ablard, AJ).

[80] ISCR Case No. 02-12840 (Jun. 15, 2004) (Young, AJ).

[81] This ruling is contrary to the requirement that a case must be decided only on record evidence, and is also not supported by the Appeal Board's decision in ISCR Case No. 99- (continued...)

Case No. 10.[82] Applicant was born in Jerusalem, received his college education in the U.S., and became a naturalized U.S. citizen. His parents, who were born in Israel, resided in the U.S. His father has been a U.S. citizen for 30 years and his mother has applied for U.S. citizenship. Applicant has six siblings, three of whom resided in the U.S. and the other three of whom resided in Israel. Applicant had two Palestinian aunts who resided in Israel but he did not consider them family members. The AJ noted that "Israel has a generally good human rights record. However, there have been problems with respect to its treatment of its Arab citizens, especially in the occupied territories." The AJ held that a country's human rights record is relevant in assessing whether a family member is vulnerable to government coercion if the foreign government has an authoritarian government, a family member is associated with or dependent on the government, or the country is known to conduct intelligence operations against the U.S. After reciting these conditions, the AJ made no finding that Israel fit in any of these categories. He ruled, however, that the applicant had not presented any evidence about the family member's occupations, social positions, political positions or other factors that would shed light on their vulnerability and accordingly, ruled against him. Although not stated explicitly in the opinion, is it apparent that the applicant was of Palestinian Arab background rather than Jewish, which in this case the administrative judge apparently believed, made him vulnerable to Israeli government influence.

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[81](...continued)
0452 (Mar. 21, 2000). That case affirmed Chief Judge Gales' 2002 decision approving a security clearance while the applicant still held an Israeli passport. Judge Gales had relied on a 1983 DoD memorandum in finding that the use of a foreign passport for personal convenience was permissible and, therefore, it did not having any security significance. (The Appeal Board's affirmance was also the reason that the "Money' Memorandum was subsequently issued.) (See f.n. 11 above). In that case, the Appeal Board, in dictum, stated; "As a general rule the parties are entitled to know what information an Administrative Judge is relying on in making a decision. There are some narrow exceptions to this general rule; official administrative notice, and matters known to an agency through its cumulative expertise." *Id.* at p. 3. The Appeal Board held in that case that it was arbitrary, capricious and contrary to law for Judge Gales to justify his decision based on the 1983 memorandum because that memorandum was not publicly available.

The only later Appeal Board case referring to that decision modified that dictum. In the later case, The Appeal Board approved the Administrative Judge's acceptance of the Money Memorandum as legally binding on him. The Board distinguished the earlier case because Judge Gales had relied on the 1983 DoD memorandum which was not made known or available to the applicant or Department Counsel before issuing his decision.

[82] ISCR Case No. 02-29871 (Jan. 12, 2005) (Foreman, AJ).

IV. DOCUMENTARY EVIDENCE USED BY DEPARTMENT COUNSEL TO PROVE FOREIGN PREFERENCE AND FOREIGN INFLUENCE

The Appeal Board has relieved the government of the burden of presenting *any* evidence to support a finding that Israel, or any foreign country, has actually coerced anyone to disclose confidential information. It reasons that the government does not have to wait for this to happen.[83] The Appeal Board has held that the burden of proof is not on the government to show that there *is* likelihood of foreign influence, but on the applicant to show that there is not.[84] This transfer of the burden of proof requires the applicant to prove that something will not happen in the future, that has never happened in the past, clearly an impossibility. Despite the government being in a much better position to know whether a foreign country has in the past, or is likely in the future to exert such influence, the argument of impossibility of proof was twice presented to the Appeal Board and twice rejected by it.[85] As a consequence, the government has never offered, or has had to offer, any direct or circumstantial evidence of coercion, or an actual case of coercion. Accordingly, it presents its case by "innuendo" evidence offering government documents concerning unrelated activities.[86] It argues that Israel is not to be trusted. Occasionally such evidence is rejected by an Administrative Judge, but generally it is accepted for "whatever value it has." The "innuendo" documents and arguments Department Counsel offers in Israel cases and the counter exhibits offered by applicants are discussed below.

1. United States Department of State: *Consular Information Sheet: Israel, the West Bank and Gaza,* June 7, 2005 (9 pages)

This document addresses the relationship of Israel to the Palestinian community in the West bank and Gaza. The government offers it a "background" but makes no other claim of relevance to any of the issues in either Guideline C, Foreign Preference, or Guideline B, Foreign Influence cases.

2. U.S. Department of State Publication: *Background Note: Israel,* September 2004

Like the first document, the government offers it as "background" but makes no other claim of relevance.

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[83] ISCR Case No. 01-17496 (Oct. 28, 2002).

[84] ISCR Case No. 03-11765 (Apr. 11, 2005)

[85] ISCR Case No. 02-00318 (Feb. 25, 2004) (reversing a favorable AJ decision); ISCR Case No. 02-26978 (Sept. 21, 2005) (again rejecting the "impossibility" argument after a request for reconsideration).

[86] This technique is not limited to Israel cases but is used with similar documents for all foreign countries with Foreign Influence - Foreign Preference issues.

3. United States Department of State: *Israel and the Occupied Territories Country Report on Human Rights Practices - 2004*, February 28, 2005

Israel is portrayed on every page of this document as a respecter of human rights. When an Israeli is accused of violating another person's rights, the Report shows that he or she is vigorously prosecuted under the law. The terrorism and violence discussed in the document is by Palestinian terrorist organizations which the Report describes as dragging Arab citizens from hospitals and jails and killing them. Nevertheless, the government offers this document to support its argument that the Israeli government is likely to coerce its citizens to exert influence on their American relatives.

4. United States Department of State: *Travel Warning: Israel, the West Bank and Gaza,* June 29, 2005

This document discusses terrorist attacks against Israel by Palestinian terrorists. It warns readers to use caution in Israel and to stay out of Gaza. When published in June 2005, it predicted violence by Israelis during the evacuation of settlements from Gaza, but subsequent events proved this prediction to be unfounded, as the evacuation was carried out peacefully and without violence. The document is irrelevant to the issues of whether Israel is likely to coerce its citizens to pressure their American relatives to disclose secrets, or to whether an applicant would have a preference for Israel.

5. National Counterintelligence Center, Annual Report to Congress on Foreign Economic Collection and Industrial Espionage for the year 2000.

The government repeatedly offers the report for the Year 2000, but never offers the subsequent reports for the years, 2001, 2002, 2003 or 2004. Applicant's objection to this document was sustained by Administrative Judge Thomas C. Graham in ISCR Case No. 03-21190 and was not admitted because the government had not offered the subsequent reports for years 2001, 2002, 2003 or 2004.

The year 2000 report, at pages 2 and 3, distinguishes between economic espionage and the open and legal collection of information. The only country cited as having engaged in industrial espionage is Taiwan (at page 8). The Report includes an Appendix (fourth from the last page) which is described as a "survey" of "almost a dozen [unnamed] fortune 500 companies," giving a "distillation of their views concerning the foreign collectors of information." Israel is among a list of six countries cited as the "most active collectors." The Appendix does not distinguish whether Israel is engaging in "industrial espionage," as defined in the Report, or is simply a lawful collector of open information which the report also discusses.

The survey information reported in the Appendix is hearsay upon hearsay, as it is a "distillation" of "less than a dozen" unnamed non-governmental sources. It has no relevance to, nor is probative of, whether any applicant would be likely to disclose classified information, or whether Israel has or would ever apply pressure on any family member in Israel to coerce classified information from an American relative. Applicant's counter-exhibits to the year 2000 Report are discussed below in Applicant's Rebuttable Evidence.

6. Defense Personnel Security Research Center Technical Report 05-10, *Technical, Social, and Economic Trends That Are Increasing U.S. Vulnerability to Insider Espionage*, May 2005

This 42 page document is a literature review containing no original data. Its "trends" are simply a statistical overview of society which, when applied to any individual case, is no more probative or relevant than taking a DNA sample of a newborn and trying to determine whether it should be imprisoned for being likely to commit a crime as an adult. Any conclusions in the document are triple hearsay since it simply a compilation of a literature search.

The document contains only one reference to Israel, which is to the case of Jonathan Pollard who was convicted of providing classified documents to Israel (on page 18). The document is objectionable if Department Counsel's purpose is to demonstrate that a person who is Jewish who has family ties to Israel, is not to be trusted with classified information. In one Israel case in which Department Counsel intended to use this document, it was withdrawn after the applicant objected. That is not to say that Department Counsel will not offer it in the future.

7. Congressional Research Service, *Issue Brief for Congress: Israeli-United States Relations,* March 16, 2005 (18 pages)

This document is objectionable because it is, arguably, not a "public record" and thus not entitled to administrative notice. Federal Rule of Evidence 803(8)requires that a document, to be considered under the public record exception to the hearsay rule, must set forth "(a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report . . .." This document does not report on the activities of the Congressional Research Service, nor does it contain anything to indicate that the CRS has a duty to file reports on U.S. - Israel relations. The document does not cite any authorities for its data or conclusions, and does not identify the status or qualifications of the author, other than as employee of the CRS. The document is, arguably, only the opinion of the author.

The CRS Issue Brief raises straw arguments against Israel only to later reject them. It states that Israel signed a contract in 1996 to sell an Airborne Radar Warning System (AWAC)to China, but later notes that none were delivered after the U.S. objected and the sale was cancelled (at page 10). The document cites two 1985 court cases, those of Jonathan Pollard, and of another person who was convicted of illegally exporting electronic switches to Israel (at page 14). In view of the solid U.S.-Israel relations from 1947 to the present, both cases are arguably aberrations in that long standing relationship.[87]

The CRS Issue Brief is a recitation of unsubstantiated, disputed facts. For that reason it is not entitled to administrative notice. Federal Rule of Evidence 201 (b) requires that "a judicially noticed

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[87] See, *"Bush Says U.S. Would Defend Israel Militarily,"* Washington Post, page A.18, Feb. 2, 2006.

fact must be one not subject to reasonable dispute in that it is either: (l) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Issue Brief does not cite the sources of its statements and conclusions, as required by Rule 201(b) many of which are disputed, and contentious. The document is no more than the opinion of its author.

8. OPSEC Operations Security Intelligence Threat Handbook, Section 5, Economic Intelligence Collection Directed Against the United States.

Department Counsel often offers only Part 3, titled "Adversary Foreign Intelligence Operations," of this document. This 1998 document is not entitled to administrative notice because, by its own description, it is not an official publication of the United States Government. It was prepared by Booz Allen Hamilton, a private company, under contract to the government, as stated in its Introduction. The Introduction further states that the contents "are not necessarily the views of or endorsed by any Government agency." The document contains no original data or research, but cites other books and documents, many written years earlier, of no known reliability as the source of its information. Objections to this document were sustained by Administrative Judge Young in ISCR Case No. 03-04132 (Feb 17, 2004), and by Administrative Judge Crean in ISCR Case No. 03-24209 (Dec. 8, 2004).

9. DoD Annual Report to Congress on The Military Power of the Peoples' Republic of China, 2005.

The only mention of Israel in this voluminous document is found on page 24 where it states: "Although Israel began the process of canceling the PHALCON program in China in 2000, Beijing continues to pursue an AWAC's variant built on an IL-76 airframe. The Israelis transferred HARPY UAV'S to China in 2001 and conducted maintenance on HARPY PARTS during 2003-2004." The Report continues however, on the same page that:

> China receives assistance from other nations too. For example, in 2001, China bought British Spey MK-202 engines to install on the FB-7 fighter bomber until a licensed produced version could be manufactured. Italy and France may be assisting China with a new medium lift helicopter. Over the last thirty years, China also has benefitted from the sale of munitions and dual use technology from France, Germany, Italy *and the United States*. (Emphasis added). (at page 24).

According to DoD, not only are our closest allies supplying China with weapons, but so is the U.S. Since, according to this Report, Israel is acting no differently than this country and our western allies, the Report is irrelevant and not probative of the issues of whether anyone in the U.S. would be likely to pass defense secrets to Israel.

The Report's statement concerning Israel's sale of the PHALCON AWAC system is rebutted by the Congressional Research Service Report on Israel-United States relations another government

document offered by Department Counsel(document No. 7, above), which states that the sale was cancelled and no PHALCONS were delivered at the request of United States.

10. Superseding Indictment, Criminal Case No. 1:05CR225 United States District Court, Eastern District of Virginia, August 2005 Term.

11. Guilty plea, Criminal Case No. 1:05CR225 United States District Court, Eastern District of Virginia, August 2005 Term.

These documents are the indictment in the case of Lawrence Franklin, Steven Rosen and Keith Weissman, now pending, for allegedly conspiring to transfer classified information to an unnamed foreign country, (which is generally known to be Israel), and the guilty plea of Franklin, a government employee, to one of the charges. Rosen and Weissman, two employees of a private lobbying organization at the time of the events alleged, are vigorously contesting the indictment. On January 19, 2006 their attorneys filed a 59 page motion to dismiss the indictment.[88] Nowhere in the indictment is it alleged that any foreign nation or foreign official contacted Franklin or took any steps to seek the information. There is also no allegation that Franklin is Jewish or has any family ties in Israel.

V. APPLICANT'S REBUTTAL EVIDENCE

In rebuttal to the government's exhibits, particularly numbers 6 and 7 above which single out the Pollard case, the following documents have been offered in applicants' cases to demonstrate that simply being Jewish, or traveling to Israel, or having distant family in Israel is not a reason to deny a clearance. Acceptance of some of these documents in evidence has met with limited success. That is not to say that offering these exhibits should not be tried again, as each administrative judge tends to look at the evidence somewhat differently than the others.

Documents demonstrating Jewish-American patriotism:

Letter from the National Museum of American Jewish Military History, Oct. 28, 2004 (2 pages)

Website: Florida Atlantic University, website "*American Jewish Heroes*" (23 pages)

Pamphlet: "*The Hall of Heroes, American Jewish Recipients of the Medal of Honor, Distinguished Service Cross, Navy Cross and Air Force Medal*," National Museum of American Jewish History. (62 pages)

Website: U.S. Army and Fox News: Korean War Hero received medal, Sept. 23, 2005 (5 pages)

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[88] The Motion to Dismiss may be found at the website of the Federation of American Scientists: www.fas.org/sgp/jud/rosen011906.pdf.

"Send for Haym Salomon," Borden Publishing Co., 1976 (96 pages)

Documents demonstrating United States Policy towards Israel:

U.S. Department of State website including: Remarks of President George W. Bush; Secretary State of Colin L. Powell; and Ambassador Cofer Black regarding U.S. relations with Israel (17 pages).

White House Press Reports and Releases regarding U.S.-Israel Relations, 2001-2005 (45 pages)

Congressional Research Service, Issue Brief for Congress, Israel: U.S. Foreign Assistance, Mar. 7, 2005 (17 pages)

Congressional Research Service, Report for Congress, U.S. Foreign Assistance to the Middle East: Historical Background, Recent Trends, and the FY 2006 Request, Feb. 17, 2005 (30 pages)

Congressional Research Service Brief for Congress: The Middle East Peace Talks, Apr. 12, 2005 (19 pages)

Washington Post: *"Bush Says U.S. Would Defend Israel Militarily,"* page A.18, Feb. 2, 2006.

Documents demonstrating that travel to Israel is not indicative of dual loyalty to the U.S.:
Website: The Holy Land Christian Ecumenical Foundation, (6 pages) Oct. 16, 2005

Website: International Christian Zionist Center (2 pages) Oct. 6, 2005

Website: The Christian Science Monitor (5 pages) Oct. 6, 2005

Website: Christian Information Center (2 pages) Oct. 15, 2004

Website: Gospel.net (3 pages) Oct. 15, 2004

Website: Holy Land Tours (3 pages) Oct. 15, 2004

Website: Pilgrim Tours (8 pages) Oct. 15, 2004

Website: Zola's Tours (10 pages) Oct. 15, 2004

Documents rebutting the National Counterintelligence Center's Year 2000 Report:
National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2001 (12 pages)

This Report does not mention Israel, but lists espionage cases involving China and Pakistan;

National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2002 (17 pages)

This Report states that there were 75 countries involved in one or more suspicious events but does not mention Israel (at page 10).

National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2003 (13 pages)

This Report states that 90 countries involved in one or more suspicious events, but does not mention of Israel (at page 2).

National Counterintelligence Center Annual Report to Congress on Foreign Economic Collection and Industrial Espionage, 2004 (27 pages)

This Report states that there were 100 countries involved in one or more suspicious events but does not mention Israel (at page 3).

Documents demonstrating that for the one Pollard case, there have been dozens of non-Jewish spies caught and convicted in the last fifty years.

National Counterintelligence Center, *A Counterintelligence Reader*, Vol. 3, Chapters 3 and 4, (1998) (228 pages)

Documents demonstrating that the indictment of Rosen and Weissman is not well founded. Letter from Senator Daniel Patrick Moynihan, Sept. 29, 1998, (2 pages), (found at: *Secrecy News*, Federation of American Scientists Secrecy Newsletter Project on Government Secrecy, Volume 2005, Issue No. 98, October 19, 2005: www.fas.org) (5 pages)

Press Release: The Reporters Committee for Freedom of the Press, Oct. 13, 2005, (found at: *Secrecy News*, Federation of American Scientists Secrecy Newsletter Project on Government Secrecy, Volume 2005, Issue No. 98, October 19, 2005: www.fas.org. (1 page)

Memorandum of Law in Support of Defendants Steven J. Rosen's And Keith Weissman's Motion to Dismiss the Superseding Indictment, Cr. No. 1:05CR225, U.S. District Court for the Eastern District of Virginia, Filed Jan. 19, 2006.(59 pages)
(Found at: http//www.fas.org/sgp/jud/rosen011906.pdf)

Documents demonstrating that OPSEC Operations Threat Handbook (Government Number 8, above) is not a government document.

Operations Security Intelligence Threat Handbook, *Introduction*, 3 pages, May 1998.

VI. CONCLUSIONS

The Appeal Board has never explained how it differentiates cases of applicants who have family members living in Israel (or any foreign country) who get a clearance, from similar applicants who do not get a clearance. The Appeal Board's decisions offer no discernable logic why a clearance will be granted in one case but not another. The only conclusion that can be drawn is that the Appeal Board will affirm all denials and reverse all grants of clearance, except if the case is so compelling that it could not withstand public criticism for its decision.

There seems to be a mostly clear, but not a definitive line between the Administrative Judges' decisions granting clearances with those denying them. Denial of clearance will be assured if an applicant refuses to relinquish an Israeli passport, or if there is any type of perceived falsification. Prior involvement with the Israeli defense industry or any contact with Israeli security will probably cause denial. If there are immediate family members or in-laws living in Israel, even if they are not connected with the government, the decision can go either way.

In no case where a clearance was granted and not appealed, was there any discussion of the applicant's willingness to bear arms for Israel in a conflict with another country, or any question asking the applicant to choose between Israel and the United States in the event of an armed conflict between the two countries. These types of questions only appear in the later cases where there were decisions granting a clearance which Department Counsel appealed. In all such cases, the Appeal Board reversed the grant of a clearance. Considering the Appeal Board's rulings in the Israel cases that were appealed, it is safe to predict that had Department Counsel appealed any of the other favorable decisions, they also would have been reversed by the Appeal Board.

An inquiry to DOHA for any written guidelines on how Foreign Preference-Foreign Influence cases are adjudicated have been answered, "there is no country list." [89] Even giving deference to the "whole person concept," and the "common sense determination" called for in the Security Clearance Guidelines, one is left with a sense of arbitrariness and unpredictability. If Department Counsel has

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[89] In response to a FOIA request for policies concerning adjudications where the applicant has family ties in other countries, documents were provided which stat that: "There is no country list. However, the President has designated Iraq, Iran, and North Korea as belonging to an axis of evil; the State Department publishes the names of countries that sponsor terrorism; the ADR references the names of several other countries including traditional allies known from open sources to target the United States for collection of intelligence; and the Commerce Department provides information as to the risks faced by American business in various counties which could have a bearing on assessing how it would treat relatives of U.S. citizens to gain access to classified information." Letter and enclosures from C.Y Talbot, Deputy, DoD Directorate for Freedom of Information and Security Review, April 6, 2004 (in the files of the Author.)

been personally offended during a hearing, or if there is animosity between Department Counsel and the applicant or his or her lawyer, or if the Administrative Judge simply had a bad day, would such factors influence the outcome of a case or the decision to appeal? One never knows, because of the apparent arbitrariness.

What then distinguishes the facts of one case where a clearance is granted and appealed by the government from another not appealed by the government? The answer appears to be nothing. In several cases, the applicant had a distinguished U.S. military record before retiring and applying for a civilian clearance. In other cases the applicant had made significant contributions to nation's defense over a long period of time before his or her clearance was questioned. In most cases, however, neither of these distinguishing elements was present.

Applying the standards announced by the Appeal Board, there would appear to be no case in which any applicant who had immediate family or in-laws living in Israel, or who had ever used an Israeli passport while a U.S. citizen, would be granted a security clearance. Yet the record shows that many clearances are granted in such cases, and that the government does not appeal about half of them.

After review of such an extensive body of case law one would expect there to be some predictability, but there is none. If DOHA would provide its policies in deciding and appealing these cases, if indeed there are such policies, applicants and their counsel would have some idea of the likelihood of obtaining a clearance more than simply a roll of the dice. In the end this could save substantial litigation effort and expense for both sides.

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EXHIBIT C

APPEAL BOARD DECISIONS
OF THE DEFENSE OFFICE OF HEARINGS AND APPEALS
Are they Arbitrary and Capricious?

Sheldon I. Cohen[1]

"Abandon hope all ye who enter here"
Dante Alighieri, *The Divine Comedy,* 1306-1321.

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[1] The author is in private law practice in Arlington, Virginia. He is the author of *Security Clearances and the Protection of National Security Information: Law and Procedures*, published by the Defense Personnel Security Research Center, Technical Report 00-4 (2000). (Hereinafter cited "*Cohen, Security Clearances*"). It is available online from the United States National Technical Information Center, www.ntis.gov, Accession Number ADA 388100. The author may be contacted at www.sheldoncohen.com.

INTRODUCTION

When I began researching this article, it was to understand why the Appeal Board of the Defense Office of Hearings and Appeals ("DOHA") sometimes departed from its stated standards of appellate review to reach a decision that appeared simply to substitute its judgment for that of the trial judge. To my surprise, after reviewing all (898) of the Appeal Board decisions between January 2000 and May 2006, I found that it did this with some frequency, but almost without fail in one category of cases, those of applicants with contacts or relatives in, or other ties to foreign countries.[2] In those six and one-half years, the Appeal Board, in cases involving a foreign connection, affirmed all (144) decisions denying a clearance, and reversed all but four (45) decisions granting a clearance.[3] In only one of those four cases did the applicant have immediate family living in a foreign country and that one was an anomaly.

While Department Counsel, the prosecution branch of DOHA, does not appeal all foreign connection decisions granting a clearance, it does appear to limit its appeals to decisions involving countries in the Middle East including Israel, and in the Far East including China, South Korea and Taiwan. If Department Counsel appeals a decision granting a clearance, it is virtually assured that the Appeal Board will reverse. Yet, if an applicant appeals a decision involving a foreign connection denying a clearance, the Appeal Board will assuredly affirm the denial. This apparently unwritten policy of the Department of Defense of a blanket denial if appealed, is a lure for the unwary applicant. If there is such a policy, it should be published to put applicants on notice that if they appeal the denial of a clearance involving a foreign connection, or the government appeals the grant of such a clearance, any hope for success at the DOHA Appeal Board is virtually nil.

CREATION AND AUTHORITY OF THE DOHA APPEAL BOARD

The genesis for granting a trial-type hearing to a defense contractor's employee if the employee's security clearance is challenged, is *Green v. McElroy*, 360 U.S. 474 (1959). The Supreme Court there held that if an employee's loyalty was questioned, the employee had the right to be shown the government's evidence and the opportunity to demonstrate that it was untrue. (See, *Cohen, Security Clearances*, Chapter 1). That requirement led to the creation of the Defense Office of Hearings and Appeals and its Appeal Board.

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[2] The Appeal Board's decisions by type of Guideline charged are collected at Appendix A to this article.

[3] The Reversal and Remand Decisions from January 2000 through May 2006 are collected at Appendix B to the Article.

The source of DOHA's authority is Department of Defense Directive 5220.6, most recently issued January 2, 1992 (the "Directive").[4] The Directive gives the General Counsel of the Department of Defense the authority to designate attorneys to be Administrative Judges as members of the DOHA Appeal Board.[5] In practice, the Appeal Board decides each case by a panel of three Administrative Judges.[6] Those Judges are generally selected from among DOHA trial judges assigned to hear cases, or from "Department Counsel" who are government attorneys assigned to represent the government's position at the hearings. An assignment to the Appeal Board is not permanent, and an Administrative Judge who is an Appeal Board member may occasionally be reassigned to try cases.[7]

The Directive includes several Enclosures which provide specific standards and procedures for adjudicating security clearances. Enclosure 3, entitled "Addition Procedural Guidance," describes the procedures for administrative hearings and appeals from those hearings. It provides that after a full hearing before a DOHA trial judge, either the applicant for a security clearance or the government, as represented by Department Counsel, may appeal the decision of the trial judge to the DOHA Appeal Board. Upon receipt of a Notice of Appeal, the Appeal Board is provided with the case record, and "no new evidence [may] be received or considered by the Appeal Board."[8]

The Directive gives specific direction to the Appeal Board and the scope of review to be applied by it. It states:

> The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred. Its scope of review shall be to determine whether or not:
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> (1) The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the

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[4] The Appeal Board is created by Paragraph 5.2.9. of the Directive.

[5] Ibid.

[6] The decisions of the DOHA Appeal Board may be found at www.defenselink.mil/dodgc/doha/isp.html. Appeal Board decisions are identified by the case number, followed by the letter "A". Decisions of the trial judge hearing the evidence are identified by the case number, followed by the letter "H".

[7] While both the Appeal Board judges and the judges initially hearing the cases are Administrative Judges, for the purposes of clarity in this article, the Administrative Judges initially trying the appeals are referred to as "trial judges".

[8] Directive, Encl. 3, Paragraphs E3.1.28, and E3.1.29.

Appeal Board shall give deference to the credibility determinations of the Administrative Judge;

(2) The Administrative Judge adhered to the procedures required by [Executive Order] 10865 and this Directive; or

(3) The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.[9]

The scope of review is similar to that which Federal Courts of Appeal are directed to use by the Administrative Procedures Act (the "APA").[10] Notably absent from the Directive is the authority found in the APA to review for "abuse of discretion," or the right to make de novo review of the facts.

The Directive also limits the extent of the Appeal Board's authority, stating:
The Appeal Board shall issue a written clearance decision addressing the material issues raised on appeal. The Appeal Board shall have authority to:

(1) Affirm the decision of the Administrative Judge;

(2) Remand the case to an Administrative Judge to correct identified error. If the case is remanded, the Appeal Board shall specify the action to be taken on remand; or

(3) Reverse the decision of the Administrative Judge if correction of identified error mandates such action.[11]

APPEAL BOARD'S EXERCISE OF ITS AUTHORITY

How the Appeal Board describes its authority and how it exercises that authority often differs. It bears close scrutiny as frequently it honors its authority in the breach to reach a desired

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[9] Directive, Encl. 3, Paragraph E3.1.32.

[10] 5.U.S.C. §706. The Administrative Procedures Act provides that a reviewing court shall set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to the constitution, in excess of statutory jurisdiction, authority or limitations, without observance of procedure required by law, unsupported by substantial evidence, or unwarranted by the facts to the extent that they are subject to trial de novo by the reviewing court.

[11] Directive, Encl. 3, Paragraph E3.1.33.

result. The Appeal Board has described its scope of review in various ways. For example, it has stated:

> An Administrative Judge's decision can be arbitrary and capricious if: it does not examine relevant evidence; it fails to articulate a satisfactory explanation for its conclusions, including a rational connection between the facts found and the choice made; it does not consider relevant factors; it reflects a clear error of judgment; it fails to consider an important aspect of the case; it offers an explanation for the decision that runs contrary to the record evidence; or it is so implausible that it cannot be ascribed to a mere difference of opinion.[12]

The Appeal Board has also described its scope of review as follows: A Judge is not at liberty to draw whatever inferences or conclusions the Judge wants to. Rather, the Judge must draw reasonable inferences and reach reasonable conclusions that take into account the totality of the record evidence, evaluate the facts and circumstances of an applicant's case in a manner consistent with the "whole person" analysis required by the Directive, and consider the totality of an applicant's conduct and circumstances under the "clearly consistent with the national interest" standard.[13]

The Appeal Board has also held:

> When an Administrative Judge's factual findings are challenged, the Board must determine whether "[t]he Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge.". . . The Board must consider not only whether there is record evidence supporting a Judge's findings, but also whether there is evidence that fairly detracts from the weight of the evidence supporting those findings.[14]

In another case the Appeal Board held:

> Under the whole person concept, a Judge must avoid a piecemeal analysis of an applicant's conduct and circumstances (citation omitted). Under the whole person concept, an Administrative Judge must assess the totality of an applicant's conduct

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[12] ISCR Case No. 00-0317 at p. 5, n. 9 (Mar. 29, 2002). *Accord*, ISCR Case No. 02-02052, n. 2 (Apr. 8, 2003); ISCR Case No. 02-06928 (Sept. 17, 2003).

[13] ISCR Case No. 99-0228 (Mar. 12, 2001).

[14] ISCR Case No. 00-0628 (Feb. 24, 2003). *Accord*, ISCR Case No. 01-02270 (Aug. 29, 2003); ISCR Case No. 99-0205, p. 2 (Oct. 19, 2000).

and circumstances in order to evaluate the applicant's security eligibility, not just consider an applicant's conduct and circumstances in a piecemeal manner.[15]

It has also held:

> Although there is no requirement that a Judge specifically cite and address every piece of record evidence, a Judge must make findings and reach conclusions that take into consideration relevant record evidence (whether that evidence is favorable, unfavorable or mixed in nature).[16]

The Appeal Board has, in a variety of cases, held that: it reviews the trial judge's decision in its entirety, not just isolated sentences, to discern what the judge found and concluded;[17] the trial judge is not measured against a standard of perfection;[18] the trial judge's decision must be a common sense determination;[19] there is a rebuttable presumption that the trial judge considered all of the evidence in the record unless the judge specifically states otherwise;[20] and that credibility determinations are entitled to deference on appeal.[21] It has held that even if there are certain disqualifying or mitigating conditions present, the trial judge can still render a decision, for or against under the "whole person" concept.[22] Sometimes the Appeal Board describes its standard of review conversely. It has held that a trial judge's decision can be arbitrary and capricious if the judge: does not examine relevant evidence; fails to articulate a satisfactory explanation for the conclusions; fails to give a rational connection between the facts found and the choice made; does not consider relevant

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[15] ISCR Case No. 00-0628 (Feb. 24, 2003). *See*, ISCR Case No. 01-00677 (May 21, 2002).

[16] ISCR Case No. 02—00318 (Feb. 25, 2004); *Cf.* Directive Encl. 3, Para. E3.1.32.1.

[17] ISCR Case No. 01-03107, at p. 5 (Aug 27,2002).

[18] Eg., ISCR Case No. ISCR No. 01-025452, at p. 10 (Nov. 21, 2002); ISCR Case No. 01-01642, at p. 4 (Jun. 14, 2002).

[19] Eg. ISCR Case No. 97-0765, at p. 7 (Dec, 1, 1998); ISCR Case No. 97-0627, at p. 7 (Aug. 17, 1998).

[20] Eg., ISCR Case No. 01-19879, at p. 2 (Oct. 29, 2002); ISCR Case No. O1-10301, at p. 3 (Dec. 31, 2002).

[21] Eg., ISCR Case No. 01-02677, at p. 4 (Oct. 17, 2002); ISCR Case No. 00-0713, at p. 3 (Feb. 15, 2002).

[22] ISCR Case No. 03-19101 (Jan. 31, 2006) (relatives in Israel). *Accord,* ISCR Case N. 04-04330 (Feb. 16, 2006) (relatives in Russia and Israel).

factors; reflects a clear error of judgment; fails to consider an important aspect of the case; offers an explanation for the decision that runs contrary to the record evidence; or renders a decision that is so implausible that it cannot be ascribed to a mere difference of opinion.[23]

A case which typifies the Board's reasoning when it wants to affirm an adverse trial judge's decisions, and its responses to the normally raised arguments is one in which the applicant appealed the denial of a clearance.[24] In that case the applicant had relatives who were citizens of Yemen but who resided in Saudi Arabia. In response to the applicant's arguments that the trial judge failed to consider the totality of the record evidence and ignored and failed to discuss evidence favorable to the applicant, the Board held that there is a rebuttable presumption that the trial judge considered all of the record evidence unless the judge specifically stated otherwise. It said that the appealing party must do more than simply cite record evidence which is not specifically discussed or mentioned in the trial judge's decision. The applicant further argued that the trial judge failed to consider the applicant's statement that he would not succumb to threats.

The Board, in response, held that a trial judge's weighing of the record evidence is not reducible to a simple formula, but he must consider the record evidence "as a whole and nothing dictates what weight, if any, a judge must give a positive piece of evidence." Moreover, it ruled, even if a judge concludes a witness' testimony is credible, a favorable credibility determination is separate and distinct from the weight the judge can give to the evidence. In deciding whether a judge acted reasonably in weighing the record evidence, the Board held it does not look at the pieces of evidence in isolation, but rather considers whether the judge exercised "common sense and sound judgment" in weighing the evidence and in reaching conclusions that "reflect a reasonably, plausible interpretation of the record evidence as a whole taking into account whether there is record evidence that runs contrary to the judge's findings and conclusions."

In response to the applicant's further arguments that the decision was arbitrary and capricious because the judge did not apply the "whole person concept," did not properly consider certain mitigating conditions, and imposed an impossible burden of proof which nullified the Adjudicative Guidelines, the Board held that it is the applicant's burden to demonstrate that the Government of Saudi Arabia would not bring pressure on the applicant. The Board rejected the impossibility of proof argument, rejected the argument that the trial judge failed to give proper weight to the evidence that the governments of Saudi Arabia and Yemen are not hostile to the United States, and rejected the distinction between friendly and hostile nations, a distinction which it had made in other cases.

Although the Board agreed with the applicant that the trial judge had made several errors of law, it did not reverse. It found that the trial judge had made no significant findings as to the nature or frequency of applicant's contacts with his immediate family who live in Saudi Arabia, and had not articulated any reason why he did not apply Foreign Influence, Mitigating Condition 3.

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23 ISCR Case No. 00-0317, at p. 5, n. 9 (Mar. 29, 2001).

24 ISCR Case No. 02-02892 (Jun. 28, 2004).

Nevertheless, considering the record as a whole, the Board concluded that the mistakes were harmless error because there was no significant chance that the trial judge would reach a different result if the case was remanded with instructions.

AFFIRM/REVERSAL RECORD OF THE APPEAL BOARD

In the six and one-half years spanning January 2000 through May 2006, the Appeal Board has decided 898 appeals. Of those, the trial judges were affirmed in 745 cases and reversed in 88 cases. 65 cases were remanded for further proceedings. That record, in itself, is not surprising since it is to be presumed that trial judges in most cases know the law and will decide the facts in accordance with the law. It is also to be expected, of course, that errors will occur in a small number of cases which is why the judicial process allows for appeals.

A closer examination of the cases, however, reveals some surprising results that weigh very heavily in favor of the government's appeals. Of the 745 appeals by applicants of the denials of a clearance, only six cases were reversed for a 0.83 percent reversal rate. Of the 111 cases appealed by Department Counsel on behalf of the government where clearances were granted, 82 were reversed for a 73.9 percent reversal rate.[25]

Even more surprising is the Appeal Board's record in Foreign Influence/Foreign Preference cases. In those cases, in 144 appeals of denials by applicants, the Board affirmed all and reversed none. Of the 49 appeals by the government granting clearances in such cases, the Appeal Board reversed 45 decisions and affirmed four. The 45 decisions that were reversed in Foreign Influence/Foreign Preference cases were decided by 31 different trial judges. How one may ask, can 31 experienced trial judges, who presumably know the law and know how to apply the facts to the law, be wrong in 92 percent of those cases granting clearances appealed by Department Counsel, but right in 100 percent of the cases denying clearances, appealed by applicant's. The inescapable conclusion is that in the last six and one half years, the Appeal Board has permitted a security clearance to be granted to anyone with foreign relatives or a foreign connection in only four cases and each of those cases was an anomaly. In two of the cases there were no foreign relatives, in one

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[25] No government agency publishes statistics on its security clearance decisions, so one does not know what percentage of Foreign Influence or Foreign Preference cases, or for that matter any category of cases, result in clearances being granted or denied. There are cases which result in clearances being granted before an initial adjudication, and cases which are adjudicated but not further appealed to the DOHA Appeal Board. Also, the decisions of the DOHA Appeal Board concern only contractor's employees and, as such, do not include all Department of Defense cases. A number of DOD cases involve government employees or military personnel and go through different channels to Department appeal boards which do not publish their decisions. Agencies such as the CIA and NSA do not publish any of their initial or appeal decisions for either contractor employees or government employees. Thus, there are an unknown number of cases involving applicants with foreign influence/foreign preference issues which may result in a clearance being granted or denied.

case, the relatives were those of the applicant's wife, and in the fourth case Department Counsel did not appeal on the issue of the foreign relatives, much to the dismay of the Appeal Board.

The four foreign influence/foreign preference cases between 2000 and 2006 affirming the grant of a clearance each presented very unique circumstances. The first case, decided in 2000, was prior to the issuance of the "Money Memorandum" which banned the holding of a foreign passport, and was the reason for its issuance.[26] That case was a Foreign Preference case and did not involve the applicant's having any family in a foreign country. The issues were solely having a dual citizenship, and holding of a foreign passport. With the issuance of the memorandum prohibiting the holding of a foreign passport on August 16, 2000, by Assistant Secretary of Defense, Arthur L. Money, that issue was thereafter foreclosed.[27]

The second case affirming a favorable decision was four years later.[28] That case presented an odd set of circumstances. Applicant was of Korean background but was born in the United States at a time when his father was here attending medical school. After completion of his training, his father and mother returned to Korea where they had three more children. Applicant's wife and her two brothers, were also citizens of Korea living in the United States but had not yet applied for U.S. citizenship. Applicant's sister was a resident U.S. alien, and his two brothers, who were in the United States illegally, had applied for immigration amnesty. Strangely, the only issue appealed by Department Counsel was the situation of applicant's two brothers. The Appeal Board concluded that Department Counsel failed to make a persuasive argument about the two brothers, and affirmed the

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[26] ISCR Case No. 99-0452 (March 21, 2000). The reaction of the Department of Defense was immediate. The day after the decision was issued, the Director of DOHA issued a Directive stating "Effective immediately and until further notice there is an across the board moratorium on the issuance of any decisions in cases involving dual citizenship issues." On April 11, 2000, DOHA's Director issued a further Directive limiting the moratorium only to "cases involving an applicant's use and/or possession of a foreign passport." This was followed on August 16, 2000, by a Directive from Assistant Secretary of Defense, Arthur L. Money, known as the "ASDC^{3}I Memorandum," or the "Money Memorandum," prohibiting the granting of a clearance to anyone holding a foreign passport unless approved by a U.S. Government Agency. The moratorium on hearing cases dealing with passport issues was lifted on September 1, 2000. Since then no one holding a foreign passport has been granted a clearance.

[27] On August 16, 2000, the Assistant Secretary of Defense for Command, Control, Communications and Intelligence (ASDC^{3}I) issued a memorandum entitled: "Guidance to DOD Contract Adjudication Facilities (CAF) Clarifying the Application of Foreign Preference Adjudications Guideline," which prohibited the further issuance of a security clearance to a holder of a foreign passport resulting from dual citizenship, "unless the applicant surrenders the foreign passport or obtains official approval for its use from the appropriate agency of the United States Government." See, ISCR Case No. 99-0454, (Oct. 27, 2000).

[28] ISCR Case. No. 02-30929 (Jan. 7, 2004).

decision granting the clearance. It noted that while it did not necessarily agree with the trial judge's reasoning or analysis concerning the issue of the parent's foreign influence issue, it could only address the issues raised by the parties. The Board indicated that had Department Counsel challenged the influence of applicant's parents living in Korea it would have reversed.

In the third Foreign Influence case in which the Board affirmed the grant of a clearance the applicant also did not have any foreign relatives.[29] The applicant was a highly decorated retired U.S. military officer who had sought and received permission from appropriate U.S. government officials to perform work on behalf of the Israeli government after his retirement. Later, he was employed by a U.S. defense contractor and was again granted permission to provide consulting services to further that company's business with Israel. The applicant had no financial interests or assets located in Israel. Under those circumstances, and most likely because of the applicant's outstanding military record, the Board affirmed the decision granting a clearance. In response to Department Counsel's argument that the judge did not consider the "hostility of Israel towards the United States," and that the record evidence shows that "Israel remains a security concern for the United States," the Board held that "the decision below does not indicate or suggest that the judge concluded Israel poses no security concern to the United States." While the Appeal Board was not prepared to concede that Israel is not hostile towards the United States, it took pains to note that the trial judge did not conclude that Israel did not pose a security concern.

The last foreign influence case, in which the Board affirmed the grant of a clearance also had unique circumstances. The applicant, an American-born Caucasian, had married a Chinese woman who he met through the internet.[30] The wife's family still lived in China. Applicant spoke no Chinese, the family spoke no English, and applicant had no contact with them. He testified he told his wife that even if they "began sending her body parts from her family" he would not disclose classified information. The Appeal Board, apparently convinced by applicant's sincerity, "from his clear and graphic language" concluded that he would not be subject to duress and affirmed the grant of a clearance.[31]

One asks how can such an overwhelming number of clearances be denied. After all, the controlling Directive sets out clear standards of review, and the Appeal Board has articulated those standards in detail. The answer appears simply to be that when the Appeal Board does not like the outcome of a case, it makes itself a "super trial judge," making its own *de novo* interpretations of the

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[29] ISCR Case No. 03-11096 (Feb. 3, 2005).

[30] ISCR Case No. 04-06564 (May 30, 2006).

[31] Acting Chief Judge Michael Ra'anan was on the panel in this case. In an odd concurring opinion by him in another case where a clearance was denied to an applicant with family in China, he said that he did not think that applicant, who had twice sought out foreign spouses, including a country with a history as problematic as China, was the type of person to whom the nation's secrets should be entrusted. ISCR Case No. 01-10128 (Jan. 6, 2005).

evidence, making its own judgments of credibility of witnesses, and supplying missing evidence by "Administrative Notice." When the Appeal Board approves of a case's outcome, it rules that a trial judge is presumed to have been aware of all of the evidence even though not discussed in the decision, but when it disapproves, it points to a particular bit of evidence not mentioned in the decision, and rules that the trial judge failed to give all of the evidence due consideration. A witness's demeanor which is often critical in determining credibility simply becomes inconsequential because the Appeal Board rules on credibility without ever seeing the witness.

Despite the Appeal Board's rules of appellate review, when it does not approve of the outcome of a case it will find a reason to ignore the rule or find a counter-rule. Clearly, the Appeal Board does not like cases granting clearances to applicants with family in foreign countries. When confronted with such cases it requires proof of an issue that is impossible to prove, i.e., that a foreign country will not bring influence to bear on the foreign family member in the future, when there is no evidence it has ever done so in the past. The Appeal Board simply states that it is not the government's burden, but the applicant's to offer that proof. An examination of Appeal Board decisions reversing the granting of clearances clearly demonstrates its practice.

APPEAL BOARD'S REVERSAL DECISIONS

1. De Novo Review

While the Appeal Board in every case recites its mantra of not reviewing a trial judge's decision *de novo*, it, in fact, does that very thing when it disagrees with the outcome of a case. This review takes many forms; it will reverse on the basis that the trial judge did not discuss a particular piece of evidence in the decision, or that the judge gave too much weight to a particular item of evidence, or that a judge gave too much weight to the credibility of a witness, or that the Board did not find a witness credible, or that looking at the record as a whole the trial judge was arbitrary and capricious. The Board couches its decisions as reversing errors of law, but they are, by any other name, simply a new review of the evidence to reach the opposite conclusion. The following are specific examples of this practice.

In a case that typifies the Appeal Board's substituting its view of the evidence for that of the trial judge, it reversed a favorable decision where the applicant had failed to disclose the full extent of his marijuana use on a security clearance application.[32] There was a substantial body of evidence showing that applicant had become a trustworthy and reliable person and that the judge found the applicant to be a credible witness. There was also evidence showing that applicant's disclosure was deliberate and his rehabilitation belated, and that he minimized his falsification at the hearing. Weighing all of the evidence, the trial judge found in applicant's favor. The Board, looking at the

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[32] ISCR Case No. 03-02486 (Aug. 31, 2004). *Accord*, ISCR Case No. 01-12350 (July 23,2003) (marijuana use). The Board in an alcohol abuse case reviewed the "totality of the evidence" to come to the opposite conclusion. ISCR Case No. 02-11454 (Jun. 7, 2004). *Accord,* ISCR Case No. 03-22819 (Mar. 20, 2006).

same evidence, reversed finding that the trial judge did not have "unfettered discretion" to decide what weight can reasonably be given to the testimony "in light of the record as a whole", and that its looking at the totality of the evidence led to the opposite conclusion. In another case, the Board held that even though the judge concluded the applicant was credible, the trial judge could not have found the applicant to be credible on all issues in the case.[33]

The Board has also created new legal standards *post hac*. It reversed a trial judge's finding that six alcohol related arrests over a 23 year period were not indicative of a pattern, even though the Board acknowledged that it had never previously defined a "pattern" in terms specific numbers over a given time. It declared in this case that six arrest over 23 years was a pattern as a matter of law.[34] The Board also reversed a trial judge's finding that the applicant had a demonstrated intent not to use marijuana in the future, because the Board was dissatisfied with the reason the applicant gave for his decision not to again use marijuana.[35]

Similarly, the Board has reversed a decision when a particular item of evidence is not mentioned by the trial judge, on the grounds that the judge "failed to discuss a significant aspect of the case".[36] It has also reversed where the applicant had a negative history of minor criminal violations but a positive history of successful work, rehabilitation and reform. The Board, in reviewing all of the evidence, held that the trial judge "gave undue weight to the evidence of reform in light of applicant's overall negative history."[37] One can only conclude that the Appeal Board will find that a particular item of evidence must be discussed, or not discussed in the trial judge's decision depending on the outcome the Appeal Board desires.

The Board has also annunciated a "reasonably disinterested person" standard to review the evidence *de novo*. In a case of an applicant with family in Taiwan the Board held that the trial judge was arbitrary and capricious in finding that Taiwan is a friendly country with a good human rights record.[38] Although stating that there is a rebuttable presumption that the trial judge considered all of the record evidence unless the judge specifically states otherwise, the Board held that presumption can be rebutted when a party can point to significant record evidenced that runs contrary to the judge's findings and conclusions, and which, as a matter of common sense or practical reasoning, should have been explicitly acknowledged and expressly taken into account. In holding that the trial

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33 ISCR Case No. 02-12329 (Dec. 18, 2003).

34 ISCR Case No. 01-22403 (Sept. 5, 2002).

35 ISCR Case No. 01-21285 (Sept. 12, 2002).

36 ISCR Case No. 02-13595 (May 10, 2005).

37 ISCR Case No. 01-03695 (Oct. 16, 2002).

38 ISCR Case No. 02-22461 (Oct. 27, 2005).

judge did not consider all of the evidence, the Board ruled that "there must be some basis in the record that would permit a reasonable disinterested person to fairly question whether the judge considered the record evidence." The Board concluded that since the trial judge focused on the evidence concerning the friendly nature of U.S./Taiwan relations and failed to mention or discuss the contrary evidence, he failed to consider all of the evidence. It thus held that the trial judge had evaluated the case in a "piecemeal manner."

The Board also rejected a trial judge's credibility finding because it was inconsistent with the Board's "reasonable interpretation of the record evidence as a whole."[39] In yet another case the Board held that a "reasonable person" would not have interpreted the security clearance application as applicant said she did, so the trial judge erred in finding her testimony credible.[40]

The Appeal Board has also substituted its own "reasonable mind" for that of the trial judge when it finds the result particularly unpalatable.[41] In a case where the applicant had twice been charged with child rape and both charges were ultimately dismissed, the Board found that the trial judge's decision "was unsustainable, given the substantial volume of record evidence that [was] not significantly rebutted other than by Applicant's denial".[42] The Board relied on a police report and a medical investigation to reverse, finding that the judge's decision was not "acceptable to a reasonable mind." The Board also rejected the trial judge's credibility determination regarding the applicant even though it was supported by his supervisor, stating that the supervisor had little interaction with the applicant outside of the work place and because there was a significant amount of contrary evidence which detracted from the applicant's credibility.[43] The Board simply was not going to allow a clearance to be granted to someone accused of, but never convicted of child rape. So much for the presumption of innocence until proven guilty.

"Piecemeal analysis" and "the whole person concept" are other fall-backs when the Board disagrees with a decision. In another Foreign Influence case, the Board, while acknowledging that the trial judge recited favorable elements of applicant's background, held that the trial judge did not

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[39] ISCR Case No. 01-06870 (Sept 13, 2002).

[40] ISCR Case No. 00-0713 (Feb. 15, 2002).

[41] The "reasonable mind" standard of review is authorized by the Directive at Para. E3.1.32(1). See, f.n. 7, supra.

[42] ISCR Case No. 01-02407 (Jan. 13, 2003).

[43] Administrative Judge Jacksetic disagreed with his colleagues on the credibility issue.

discuss or explain how those elements addressed the security concerns raised by the evidence.[44] It held that the judge failed to articulate a rational basis for his conclusion, therefore the trial judge's review of the record was "a piecemeal analysis which is not consistent with the whole person concept."[45]

Similarly, the Board reversed finding that the trial judge had analyzed numerous acts of misconduct separately. It held that the judge failed to consider the significance of applicant's pattern of conduct.[46] In not considering the "evidence as a whole" the judge did not apply the "whole person concept."

"Common sense" is another standard within the Board's superior purview. In a case involving an applicant who was charged with making false statements under oath earlier in his career, the Appeal Board reversed the trial judge, holding that he did not properly evaluate the applicant's case "under the whole person concept . . . in a common sense manner that is supported by the record evidence as a whole".[47] It held that the trial judge failed to articulate a satisfactory explanation for his conclusion that the applicant had recognized the gravity of his false statements, and his conclusion, therefore was "arbitrary and capricious." Under this boundaryless criterion, the Board simply made a *de novo* review and came to its own conclusion and its own "common sense determination" in "considering the record as a whole."

Sometimes the Board just looks at the evidence, weighs it, and comes to the opposite conclusion. In reversing the grant of a clearance in a case involving alcohol abuse, the Appeal Board held that the trial judge was wrong in concluding that the alcohol abuse which had occurred a number of years earlier was no longer a problem because the applicant had not completely abstained from using alcohol.[48] Whether the moderate drinking indicated a "current problem" is the very type of determination vested in the trial judges by the Directive, but the Appeal Board made a *de novo* review as a "super trial judge" to impose its own view of the evidence.[49]

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[44] ISCR Case No. 02-22461 (Oct. 27, 2005).

[45] Cf, ISCR Case No. 01-16419 (Mar. 19, 2003).

[46] ISCR Case No. 03-27170 (May 5, 2006). *Accord*, ISCR Case No. 01-20906 (Jan 10, 2003)(falsification); ISCR Case No. 01-07657 (Aug. 29, 2002)(financial issues).

[47] ISCR Case No. 03-24233 (Oct. 12, 2005).

[48] ISCR Case No. 02-26915 (Aug. 4, 2005)

[49] *Accord*, ISCR Case No. 01-24385 (Apr. 13, 2004) in which the Board reversed, as arbitrary and capricious, a trial judge's decision that the security violations were isolated or infrequent. The Board's view of the evidence was that there was lax handling of classified

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Another case where the Board weighed the conflicting evidence and made its own credibility determinations concerned alcohol consumption and drug use. There, the trial judge, applying the whole person analysis, accepted the applicant's explanation that he did not believe that two puffs on a marijuana cigarette constituted "use", and determined therefore, that the omissions on his security clearance application were not deliberate.[50] After first stating that trial judge's credibility determinations are entitled to deference on appeal, the Board held that deference is not "unfettered". The Appeal Board made its own determination based on its own review of the evidence that applicant's statements were not credible, and therefore, the trial judge's favorable whole person analysis of applicant was unsustainable.

The Board simply disagreed with the trial judge's findings in another alcohol abuse case where the trial judge found that the applicant no longer abused alcohol, and that the applicant's limited use of alcohol would not adversely effect applicant's ability to safeguard classified information.[51]

Lack of a "plausible explanation" is another Board standard of appellate review. It, predictably, reversed a case where the applicant's brother was an employee of the Syrian government.[52] Even though the trial judge in his decision acknowledged the authoritarian nature of the Syrian government, the Board held that the judge's decision lacked a plausible explanation for why applicant's family ties with immediate family members living in Syria were extenuated or mitigated sufficiently to warrant a favorable security clearance decision.

Lack of "corroboration" is justification for the Board to review the evidence and reverse. Despite the Board's stated deference to the trial judges' credibility determinations, it reversed a favorable decision concerning prescription drug dependence.[53] Although the trial judge made a favorable determination of the applicant's testimony, the Board held that there was no evidence to corroborate the applicant's testimony that he was no longer dependant on prescription drugs, and therefore, it was arbitrary and capricious for the judge to rely on applicant's testimony no matter how credible it was.

"Totality of the findings" is another reason given to reverse. When unhappy with a decision, the Appeal Board will simply review the evidence which could just as easily support the trial judge's

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[49](...continued)
documents.

[50] ISCR Case No. 03-21220 (Aug. 24, 2005).

[51] ISCR Case No. 03-07874 (July 7, 2005).

[52] ISCR Case No. 02-24254 (Jun. 29,2004).

[53] ISCR Case No. 02-20110 (Jun. 3, 2004).

findings, and reverse. For example, an applicant's history of alcohol abuse was found by the trial judge to have been mitigated because the earlier alcohol incidents were dated, because the alcohol consummation had diminished significantly, and because the applicant presented credible evidence that he reformed his drinking habits.[54] After reviewing the evidence the Board reversed, holding the trial judge's conclusion was arbitrary and capricious in light of the totality of the findings which included applicant's having admitted to drinking to the point of intoxication, and the absence of any evidence to corroborate applicant's claim that he has taken corrective action to prevent a pattern of alcohol abuse from developing.

2. The "Whole Person" Concept

The Directive incorporates the government-wide Adjudicative Guidelines for Determining Access to Classified Information, (the "Adjudicative Guidelines") which requires the weighing of a number of variables about the person, past and present, favorable and unfavorable in reaching a determination.[55] These variables, known as the "whole person concept," include: the nature, extent and seriousness of the conduct; the circumstances surrounding the conduct; the frequency and recency of the conduct; the individual's age and maturity at the time; voluntariness of participation; presence or absence of rehabilitation; the person's motivation, and potential for pressure, coercion, exploitation and duress; and the likelihood of continuation or recurrence.[56] These considerations normally fall within the purview of the trial judge in hearing the testimony, weighing the evidence, and making credibility judgments. Despite the Appeal Board's oft-stated deference to the trial judge's credibility determinations, and its presumption that all the evidence was considered, even if a particular item of evidence was not mentioned in the decision, the Appeal Board has used the generality of the "whole person concept" to overturn decisions which it disfavored. Using the whole person concept, the Appeal Board reversed a trial judge who found that the applicant's one-time use of marijuana four years earlier was an isolated incident.[57] In that case the Appeal Board found that:

> [T]he Administrative Judge's favorable whole person analysis relies in part on his explicit acceptance of Applicant's explanation that he did not believe that two puffs

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[54] ISCR Case No. 03-07848 (July 7, 2005).

[55] Directive, Enclosure 2, Para. E2.2. The Adjudicative Guidelines were originally published in 1998 as Government-wide criteria at 32 C.F.R. Part 147. They were recently updated by a Notice from the National Security Council on December 29, 2005.

[56] Ibid.

[57] ISCR Case No. 03-21220 (Aug. 24, 2005).

on a marijuana cigarette in 2001 constituted use of the drug and that therefore 'the omissions were not deliberate and are thus mitigated'.[58]

It reversed because:

> The Administrative Judge in his whole person analysis did not analyze Applicant's omission or the credibility of Applicant's explanation for the omission . . .. Although an Administrative Judge's credibility determination is entitled to deference on appeal, the deference is not unfettered. In this case, the Judge's credibility determination is sufficiently undercut by Applicant's own testimony and by relevant aspects of Applicant's prior history, so as to make the Judge's credibility determination unsustainable. Furthermore, the Judge's whole person analysis is also unsustainable for the same reasons.[59]

The Appeal Board made itself a "super trial judge," to make its own credibility and whole person judgments.

The Adjudicative Guidelines, incorporated as Enclosure 2 to the Directive, states that "the adjudicative process is the careful weighing of a number of variables known as the whole person concept", and that each of the Guidelines "is to be evaluated in the context of the whole person".[60] This "whole person concept" is intended to take into account the applicant's background, motivation and circumstances surrounding the conduct in issue. Instead, it has morphed into a justification for reviewing the whole of the evidence so the Board can come to its own conclusions, in other words a justification for a *de novo* review.

In a case involving an applicant who was charged with making false statements under oath earlier in his career, the Appeal Board reversed the trial judge because he did not properly evaluate the applicant's case "under the whole person concept . . . in a common sense manner that is supported by the record evidence as a whole and is not arbitrary and capricious."[61] The Board held that the trial judge failed to articulate a satisfactory explanation for his conclusion that the applicant had recognized the gravity of his false statements, and that the trial judge's conclusion that the applicant understood the gravity of his conduct and recognized his error is "arbitrary and capricious." The Board made its own "common sense determination", and the "whole person concept" became "the record evidence as a whole."

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58 Ibid.

59 Ibid.

60 Directive, Paras. E2.2.1 and E2.2.3.

61 ISCR Case No. 03-24233 (Oct. 12, 2005).

In another case the Board reversed and remanded because the trial judge's "whole person analysis" did not take into account several errors that the Board found when the case was appealed.[62]

3. Requiring An Impossible Burden of Proof

The Appeals Board has affirmed all (141) denials and reversed 45 out 47 grants of a clearance involving an applicant with relatives in a foreign country, by requiring the applicant to prove the impossible; that even though there was no evidence that a foreign country had ever sought to influence anyone with a security clearance by bringing pressure on a foreign family member, that such country would not do so in the future.[63] In case after case every variety of argument by an applicant has been rejected.

The "impossibility of proof" argument was directly raised and rejected by the Appeal Board in ISCR Case No. 02-00318 (Feb 25, 2004), and again in ISCR Case No. 02-26978 (Sept 21, 2005) where the Appeal Board was asked to reconsider the issue.[64] In the first case the Board ruled that the applicant had not proven that his elderly mother and sisters, who had no contact or ties with the Iranian government, could not be exploited by the Iranian Government so as to force him to choose between them and his obligation to safeguard classified information.[65] Under the criterion laid out by this and numerous other decisions, there is simply no way that the Board would affirm a trial judge's decision granting a clearance to someone with immediate family in a foreign country.[66] Administrative Judge Michael Y. Ra'anan (now Acting Chief Judge of the Appeal Board) in a 2003 dissenting opinion, expressed concern that Mitigation Condition 1,(i.e., that family members in a

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[62] ISCR Case No. 03-19101 (Jan. 31, 2006).

[63] The two anomalous cases are discussed above, at pages 9 and 10. ISCR Case No. 02-30929 (Jan. 7, 2004); ISCR Case No. 04-06564 (May 30, 2006).

[64] ISCR Case No. 02-00318 (Feb 25, 2004) was appealed to the United States District Court for the Eastern District of Virginia in Civil No. 1:04cv439 where it was argued that requiring an impossible proof was arbitrary, capricious and an abuse of discretion. Summary Judgment was granted to the Government by Judge Leonie Brinkema who did not address the burden of proof issue, but ruled that the granting of security clearances was within the discretion of the administrative agencies. The case was not appealed further.

[65] ISCR Case No. 02-00318 (Feb 25, 2004).

[66] Eg,. ISCR Case No. 02-26826 (Nov. 12, 2003) (relatives in Turkey); ISCR Case No. 01-20908 (Nov. 23, 2003)(relatives in Iran); ISCR Case No. 02-04786 (Jun. 27, 2003); ISCR Case No.99-0532 (Feb 27, 2001)(relatives in "FC", presumably Iran).

foreign country could not be exploited to bring pressure on an applicant) was rendered unusable.[67] He was quite correct, but in every case since, he has agreed with the other Appeal Board members to require the applicant to prove the impossible. Yet Department Counsel, inexplicably, does not appeal all such cases. As noted in an earlier article by this author concerning foreign preference/foreign influence cases dealing with Israel, the choice of why some decisions are appealed by Department Counsel and others not, can only be rationalized as arbitrary and capricious.[68]

In reversing another decision granting a clearance to an applicant with family in Iran, the Appeal Board did note that the Judge "[made] mention of 'tension' between the U.S. and Iran". However, it reversed the trial judge on the basis that the applicant had not proven that his elderly mother and sisters, who had no contact or ties with the Iranian government, could not be exploited by the Iranian Government so as to force him to choose between them and his obligation to safeguard classified information. By placing on the applicant the impossible burden of proving that something which has not happened in the past, will not happen in the future, assures that no ruling of any trial judge granting a clearance concerning a country of which the Appeal Board does not approve will ever be sustained on appeal, regardless of the evidence or rational of the trial judge's decision.

In another case involving an applicant with family in Syria and Saudi Arabia, the trial judge's finding that applicant's family members in Syria were not agents of the Syrian government was not challenged by the government.[69] However, the Appeal Board again ruled that the applicant could not prove that his immediate family members, even though not associated with the Syrian government or its foreign intelligence service, would not be subject to influence if the Syrian government chose to apply it. Applicant argued that the evidence of his character and his ties to the United States showed that he "would make the right choice if the Syrian government tried to exploit his ties with his parents in Syria." The Appeal Board held that argument to be unpersuasive, and that the possible foreign influence on his parents did not hinge on what choice the applicant might make if he were forced to choose between his loyalty to his family and his loyalty to the United States, rather on whether the applicant presented evidence sufficient to demonstrate that he would not be placed in a position where he would be forced to make such a choice.[70]

In a case involving an applicant with family in Israel the Board reversed the trial judge's favorable decision. Typical of many other cases, the applicant testified that his mother living in Israel was elderly and was not dependant on applicant for support, and that neither his sister nor

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[67] ISCR Case No. 02-04786 (Jun. 27, 2003).

[68] See *Israel: Foreign Preference-Foreign Influence Cases-A Review of DOHA Decisions, March 2006*, at www.sheldoncohen.com/publications.

[69] ISCR Case No. 03-24933 (July 28, 2005).

[70] ISCR Case No. 04-06564 (May 30, 2006); *Accord*, ISCR Case No. 00-0484 (Feb. 2, 2002).

brother who lived in Israel had ever worked for the Israeli government. The Board, reversing, stated that the applicant did not offer proof that the government of Israel would never apply influence on his elderly mother, his sister or his brother.[71] In that case the applicant testified that he had long-standing ties to the United States and that if he were ever approached by anyone seeking information on his classified work, he would report such a contact or threat to a responsible security official. The Appeal Board ruled that it could not rely on what the applicant stated he would do under a hypothetical set of circumstances since he had never been approached to provide classified information, and he could not prove what he would do if subjected to that influence.

Based on the same arguments and the same reasoning, the Appeal Board reversed the grant of a clearance in two cases where the applicants had family in Taiwan.[72] The Appeal Board held that it was immaterial whether the applicant testified as to what choice he would make between immediate family members and the United States, and immaterial whether the foreign country is friendly or unfriendly. In the second of those cases the Board held that not only is it immaterial what choice the applicant testified he would make if confronted and forced to make such a choice, it is also immaterial whether applicant's contacts with his immediate family members are infrequent. The burden of proof, the Board held, is always on the applicant to show that immediate family members in a foreign country would not be subject to influence and pressure exerted by the foreign government regardless of what action the applicant stated he would take if confronted with that situation.[73] Clearly, so long as a family member is in a foreign country, there is no proof that could be offered to mitigate that situation. In another case involving family members in Iran, the Board held that it did not matter that: (1) applicant lacked frequent contact with his relatives; (2) the relatives did not depend on applicant for support; (3) applicant refused to travel to Iran; (4) applicant strictly followed rules related to work; (5) the choice applicant might make if forced to choose between his loyalty to his family and to the United States; or (6) there was no evidence that the Iranian government had ever targeted applicant or his family in the past. The Board held that none of that evidence was sufficient to support a conclusion that the Iranian government was not likely to target applicant in the future.[74] In short, there is no evidence that an applicant can produce that

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[71] ISCR Case No. 03-15485 (Jun. 2, 2005). *Accord*, ISCR Case No. 03-04033 (Feb. 16, 2006) (family in Russia and Israel).

[72] ISCR Case No. 02-31154 (Sept. 22, 2005); ISCR Case No. 02-24267 (May 24, 2005). *Accord*, ISCR Case No. 03-09053 (Mar. 29, 2006) (relatives in China).

[73] ISCR Case No. 02-24267 (May 24, 2005). *Accord*, ISCR Case No. 01-26893 (Oct. 16, 2002);(family in Iran); ISCR Case No. 01-17496 (Oct. 28, 2002) (family in Israel).

[74] ISCR Case No. 03-15205 (Jan. 21, 2005); *Accord*, ISCR Case No. 03-02382 (Feb. 15, 2005). (Relatives in Iran); ISCR Case. No. 04-06564 (May 30, 2006)(relatives in China); ISCR Case No. 02-21927 (Dec. 30, 2005)(relatives in Saudi Arabia, remanded); ISCR Case No. 02-24254 (Jun. 29,2004)(relatives in Syria); ISCR Case No. 02-15339 (Apr. 29, 2004)(relatives

(continued...)

will overcome that presumption. In a case involving an applicant with relatives in Taiwan, the Board held that the trial judge was arbitrary and capricious in finding that applicant's relatives were not subject to coercion and duress by the government of Taiwan when the judge's findings were based on his relatives being elderly, that they had no ties to the government, they were financially self sufficient, they were eager to become permanent residents of the United States and that Taiwan was a friendly country and a commercial ally.[75] As in other cases, regardless of any evidence the applicant could muster, he could not prove the impossible.

In a case where the applicant's brother was an employee of the Syrian government the Board reversed, noting that Syria has been on the U.S. list of state sponsors of terrorism since 1979 and that the trial judge had acknowledged the authoritarian nature of the Syrian government.[76] The Board held that the judge's decision lacked a plausible explanation for why applicant's family ties with immediate family members living in Syria were extenuated or mitigated sufficiently to warrant a favorable security clearance decision.

In a case of an applicant with immediate family members in Iran, the Board held that even though: (1) applicant had a security clearance for many years without violating security; (2) the government did not tell her before the proceedings that her contacts with family members in Iran posed a security risk; (3) there was no evidence that the Iranian government was aware of her access to classified information; and (4) her family members living in Iran would not betray U.S. classified information for the benefit of the Iranian Government, that was not sufficient to meet the requirement that the applicant's family members not be subject to foreign influence.[77] The Board held that the judge's favorable credibility determination of applicant's testimony was no substitute for record evidence that would provide a basis to conclude that applicant's family would not be subject to influence.

The Board rejected the argument that consideration should be given to countries that are friendly to the United States in the case of an applicant with immediate family members in Taiwan.[78] The Board noted that there are cases where individuals have committed espionage against the United States by passing classified information to countries that are not considered hostile to the United States.

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[74](...continued)
in China).

[75] ISCR Case No. 02-23860 (Jun. 30, 2005).

[76] ISCR Case No. 03-24933 (July 28, 2005).

[77] ISCR Case No. 02-14995 (Jul. 26, 2004).

[78] ISCR Case No. 02-18668 (Feb. 10, 2004).

In another reversal involving an applicant with family in Taiwan, the Appeal Board held that the trial judge placed undue significance on the absence of any security violations by the applicant.[79] Since employers are required to record and report only security violations, and do not make a record where there are no violations, there is no way that an applicant can prove a negative, particularly where the government would have unique knowledge if there were any security violations.

4. Discretion of the Trial Judge

One of the favorite phrases of the Board, when it simply disagrees with a trial judge's decision, is that the judge does not have "unfettered discretion". Never has the Board defined what it considers "unfettered" discretion, so one can only conclude that a trial judge must hear the case wearing leg irons.[80]

Typical of this reasoning is a case in which the applicant had family in Israel.[81] The applicant had been married four times and each of the wives had dual citizenship with other countries. He also had four children and step-children who had dual citizenships. The Board concluded, given the network of family members in foreign countries, that mitigation was not warranted irrespective of the trial judges's favorable view of the applicant's testimony and the testimony of the character witnesses. The Board held that the "application of the Adjudicative Guidelines is not left to the unfettered discretion of the trial judges, but requires the exercise of sound judgement within the parameters set by the Directive."

The Board in another case held that the trial judge, in weighing the evidence, did not have "unfettered discretion" to decide what weight could reasonably be given to the testimony in light of the record as a whole, and held that the totality of the evidence led it to conclude that the judge committed harmful error.[82] Also, it held, a trial judge does not have "unfettered" discretion to relax the technical rule of evidence.[83]

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79 ISCR Case No. 03-16848 (Aug. 30, 2005).

80 "Fetters" are leg restraints to prevent prisoners from fleeing. Compact Oxford English Dictionary.

81 ISCR Case No. 03-11765 (Apr. 11, 2005)

82 ISCR Case No. 03-02486 (Aug. 31, 2004).

83 ISCR Case No. 02-06478 (Dec. 15, 2003).

Where an applicant could not account for six classified documents over a period of time, the Board held that it was arbitrary or capricious for the trial judge to categorize the violations as isolated or infrequent, finding there was lax handling of classified documents for the applicant.[84]

5. Supplying Missing Evidence

Despite the Directive's requirement that "no new evidence shall be received or considered by the Appeal Board",[85] the Appeal Board has held that it (and a trial judge) may take administrative notice of documents or evidence not in the record, and it (and a trial judge) is not precluded merely because none of the parties cited the document or asked that trial notice of it be taken.[86] It has held that administrative notice is analogous to judicial notice, citing Federal Rule of Evidence, 201(f), which states that "Judicial notice may be taken at any stage of the proceeding."[87] The Appeal Board has held that that Rule of Evidence clearly is embraced in its decisions.[88] It has taken administrative notice of Department of State publications, and of official documents posted by Federal departments or agencies on their web sites.[89] It has held that there is no denial of due process stemming from its taking administrative notice, even though a document was not offered by either party at the hearing.[90]

6. Failure to Discuss an Item of Evidence

Part of the Appeal Board's usual spiel is that the trial judge does not have to discuss every item of evidence in the decision, and that it is presumed that the judge has considered all of the evidence. The Board will condone a trial judge's failure to discuss relevant evidence when it approves of the desired outcome.[91] But when it wants to reverse, the Board will find a particular piece of evidence or testimony, and use the lack of a reference to it in the trial judge's decision as justification to reverse. The Appeal Board uses the rubric that the trial judge must consider the "totality of the record evidence" to reevaluate the evidence in any case with which it disagrees, in order to come to a different result. For example, in an alcohol abuse case the Board reversed a trial

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84 ISCR Case No. 01-24358 (Apr. 13, 2004).

85 Directive, Encl. 3, Para. E3.1.28, and E3.1.29.

86 ISCR Case No. 98-0507 (May 17, 1999); ISCR Case No. 00-0244 (Jan. 29, 2001).

87 ISCR Case No. 02-06478 (Dec. 15, 2003).

88 ISCR Case No. 99-0452 (Mar. 21, 2000).

89 ISCR Case No. 02-06478 (Dec. 15, 2003); ISCR Case No. 99-0452, f.n.7 (Mar. 21, 2000).

90 ISCR Case No. 00-0244(Jan. 29, 2001)

91 *See,* ISCR Case No. 99-0228 (Mar. 12, 2001).

judge who found that the applicant no longer abused alcohol.[92] The Board noted that the trial judge made no mention that the applicant was still under court imposed probation for an earlier DUI incident, and that his failure to discuss "an important aspect of the case" was error.

In another case where the applicant's mother and two sisters lived Iran, the Board noted that the judge failed to make any mention that Iran was hostile to the United States even though there was evidence of that in the record. It held that there was a serious question as to whether "the judge forgot that aspect, ignored, failed to take it into account, dismissed that aspect of the case for no apparent reason, failed to understand the significance of that aspect of the case or engaged in an arbitrary or capricious analysis."[93] The Appeal Board declined to remand to give the judge the opportunity to discuss the hostility of the government of Iran. Similarly, in a case involving relatives in Libya, the Appeal Board acknowledged that it is well settled that the trial judge need not discuss every piece of evidence. Nevertheless, it reversed because the judge's conclusions in the written decision did not take into account Libya's human rights record.[94]

The Appeal Board will ignore its repeated pronouncement that the trial judge is presumed to have considered all of the evidence in the record unless specifically stated otherwise, and will reverse a decision not to its liking by selecting a statement from the transcript, or an exhibit not mentioned or not emphasized in the trial judge's decision. For example, the Appeal Board reversed a decision granting a clearance to an applicant who had a sister living in Iran where Department Counsel had presented evidence that the Government of Iran was hostile to the United States. Applicant did not rebut or challenge that evidence. Nevertheless, the Appeal Board noted that:

> Although the Administrative Judge found that 'Applicant decided to leave Iran in order to pursue a life free of the dictatorship imposed by the ruling fundamentalist regime in the [Iran], the Administrative Judge did not discuss, mention or acknowledge the record evidence indicating that the Government of Iran is hostile to the United States".[95]

The Appeal Board acknowledged applicant's argument that "there is a rebuttal presumption that the judge considered the record evidence and there is no requirement that the judge cite to Board decisions in issuing his own decision". Yet despite the existence of numerous prior Board decisions discussing the hostility of Iran, it held that:

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[92] ISCR Case No. 03-07874 (July 7, 2005).

[93] ISCR Case No. 02-02195 (April 9, 2004). *Accord,* ISCR Case No. 02-22461 (Oct. 27, 2005)(Taiwan).

[94] ISCR Case No. 04-05317 (Jun. 3, 2005). *Accord*, ISCR Case No. 02-13595 (May 10, 2005). (Tension between the U.S. and Iran).

[95] ISCR Case No. 02-00318 (Feb. 25, 2004).

> the Judge's failure to discuss or even acknowledge the hostility of the Iranian government toward the United States . . . indicated the Judge overlooked or ignored significant record evidence that runs contrary to his finding and conclusions and demonstrates the arbitrary and capricious action."[96]

One can only conclude that either the Appeal Board felt that the Administrative Judge had not read a newspaper or any Appeal Board decision in the last thirty years, or that it simply was not going to allow a security clearance to anyone with a relative in Iran regardless of the evidence or the trial judge's decision.

On the other hand, when the Appeal Board approves of the outcome, it simply dismisses, as unimportant, the trial judges's failure to discuss significant evidence. In the case of an applicant with a family member in Saudi Arabia, the Appeal Board affirmed the denial of a clearance stating:

> Applicant presented evidence about his contacts with his immediate family members to show that they are not frequent and to rebut the presumption that they are not casual. Apart from the referring to Applicant's contacts with his parents as 'sporadic' the Administrative Judge made no specific finding about the nature or frequency of Applicant's contacts with his immediate family members who live in Saudi Arabia, and did not articulate any reason for why he did not apply Foreign Influence Mitigating Condition 3. However, considering the record as a whole, the Board concludes the Judge's failure constitutes harmless error because there is not a significant chance that the Judge would reach a different result if the Board were to remand the case with instructions that the Judge explicitly discuss Foreign Influence Mitigating Conditions 3.[97]

Similarly, in a case involving an applicant with relatives in Jordan and Syria, the Appeal Board dismissed the applicant's argument that the trial judge's failure to mention applicant's testimony that he would not betray the United States if family were threatened, indicated that the trial judge did not consider that testimony. The Appeal Board, while agreeing that such testimony was relevant, did not reverse because it held such testimony was "of limited relevance" and could not have had much weight on the trial judge's decision.[98]

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96 Ibid.

97 ISCR Case No. 02-02892 (Jun. 28, 2004).

98 ISCR Case No. 02-26978 (Sept 21, 2005).

7. Reviewing Credibility Determinations

The Appeal Board's stated position that credibility determinations are entitled to deference on appeal is often ignored when the Board disagrees with the outcome of the case.[99] While it has held that a trial judge's credibility determination without the benefit of demeanor observations is no different than a judge's fact finding on a purely documentary record,[100] the Board will make its own credibility determination as it sees the need arise. For example, in a case where the applicant with immediate family members in Iran testified that: (1) she held a security clearance for many years without violating security; (2) the government did not tell her before the proceedings that her contacts with family members in Iran posed a security risk; (3) there was no evidence that the Iranian government was aware of her access to classified information; and (4) her family members living in Iran would not betray U.S. classified information for the benefit of the Iranian Government, was not sufficient to show that the applicant's family members would not be subject to foreign influence.[101] The Board held that the judge's favorable credibility determination of applicant's testimony was no substitute for record evidence that would provide a basis to conclude that applicant's family might be subject to influence.

The Board has reversed credibility determinations solely on the basis that they were not corroborated.[102] It has ruled it to be arbitrary and capricious for a trial judge to accept a witnesses testimony without considering whether it is plausible and consistent with other record evidence.[103]

In a case involving an applicant who was charged with making false statements under oath earlier in his career, the Appeal Board reversed the trial judge stating he did not properly evaluate the applicant's case "under the whole person concept . . . in a common sense manner that is supported by the record evidence as a whole and is not arbitrary and capricious."[104] The Appeal Board had little use for the trial judge's credibility determination, holding that "the judge's conclusion that applicant was a credible witness did not mean that the judge was free to accept

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[99] Eg, ISCR Case No. 01-02677, at p. 4 (Oct. 17, 2002); ISCR Case No. 00-0713, at p. 3 (Feb. 15, 2002).

[100] ISCR Case No. 01-12350 (July 23, 2003).

[101] ISCR Case No. 02-14995 (Jul. 26, 2004).

[102] ISCR Case No. 00-0620 (Feb. 19 2001).

[103] ISCR Case No. 00-0228 (Mar. 12, 2001).

[104] ISCR Case No. 03-24233 (Oct. 12, 2005). *Accord*, ISCR Case No. 03-02486, (Aug. 31, 2004)(judge does not have unfettered discretion to decide what weight to give to the evidence).

applicant's testimony in an uncritical manner without regard to its meaning and significance in light of the record evidence as a whole."

In one of the few cases where an applicant's appeal of an adverse decision was reversed, the Board held that the record as a whole did not support the trial judge's negative credibility determination, which significantly affected his decision on other issues in the case.[105]

The Board reversed a favorable decision concerning prescription drug dependence. Despite the trial judge's favorable credibility determination of the applicant's testimony, the Board held that there was no evidence to corroborate his testimony that he was no longer dependant on prescription drugs, and therefore it was arbitrary and capricious for the judge to rely on applicant's uncorroborated second hand lay testimony about the medical opinion of applicant's pain management specialist.[106]

Despite what the Board says it does, credibility determinations are what they appear to be in the eyes of the last beholder.

8. Lack of Corroborating Testimony

When the Appeal Board has nothing else on which to reverse a decision it does not like it has overturned the trial judge's credibility determination because the applicant's testimony lacked corroboration. In a case of concerning a history of alcohol abuse, the applicant was found by the trial judge to have mitigated the abuse because the earlier alcohol incidents were dated, because the alcohol consummation had diminished significantly, and because the applicant presented credible evidence that he reformed his drinking habits.[107] The Board reversed, holding the trial judge's conclusion was arbitrary and capricious in the absence of any evidence to corroborate the applicant's claims that he had taken corrective action to prevent a pattern of alcohol abuse from developing. The Appeal Board made its own review of the evidence which could just as easily have supported the trial judge's finding, and reversed.[108]

Similarly, in reversing the grant of a clearance to an applicant with family in Libya, the Board rejected the judge's findings because it said the applicant offered no "corroboration" for his

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105 ISCR Case No. 02-12789 (May 13, 2005).

106 ISCR Case No. 02-20110 (Jun. 3, 2004).

107 ISCR Case No. 02-11454 (Jun. 7, 2004).

108 *Accord*, ISCR Case No. 03-27170 (May 5, 2006); ISCR Case No. 00-0713 (Feb. 15, 2002)(testimony regarding repayment of debts).

testimony that his relationship with his brothers in Libya was distant.[109] However, in a more recent case the Board acknowledged the difficulty of corroboration in a case of an applicant with family in China. The Board noted:

> Department Counsel notes that the only evidence on the subject [of applicant's parents] is Applicant's testimony. Given the realities of the evidentiary record available to the Judge in most DOHA cases, and the substantial evidence rule, it untenable to *require*, as a matter of law that Administrative Judges have more than Applicant's testimony for each finding of fact. . . .[That] does not necessarily mean that the finding is entitled to much weight.[110]

Where the issue was applicant's resolution of claims by the IRS for back taxes, the Board held that it was arbitrary and capricious for the trial judge to accept applicant's uncorroborated testimony of his efforts. It said that the judge's finding that the applicant had made good faith efforts to resolve the claim did not reflect a reasonable interpretation of the record as a whole.[111]

9. Review of Entire Record as a Whole

The Board will often use the expressions "piecemeal manner" or "piecemeal analysis" to reach its own conclusion and reverse even when the record is complete, when the trial judge has addressed all of the issues and all of the evidence, and when the credibility determinations are supported by corroborating testimony. It also uses "piecemeal analysis" interchangeably with the term "the whole person concept", confusing how the evidence is analyzed with what the evidence is.[112] In a variation on this theme the Board will reverse if it concludes that the Judge did not consider the "record as a whole."[113]

For example, in reversing the trial judge in a case where the applicant had family members in Taiwan, the Board noted that although the trial judge had correctly recited the legal standards to be applied, he failed to support that recitation with his findings.[114] It held that the trial judge used his finding that Taiwan is a friendly country in an arbitrary and capricious manner, because friendly

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109 ISCR Case No. 04-05317 (Jun. 3, 2005).

110 ISCR Case No. 03-10955 (May 30, 2006).

111 ISCR Case No. 01-03695 (Oct. 16, 2002).

112 ISCR Case No. 99-0601 (Jan. 30, 2001).

113 See, ISCR Case No. 03-22563 (Mar. 8, 2006). *Accord,* ISCR Case No. 00-0628 (Feb 24, 2003)(finding that the judge analyzed each foreign contact in Sweden separately).

114 ISCR Case No. 02-22461 (Oct. 27, 2005).

countries or those who have a good human rights record also engage in intelligence gathering. After stating that there is a rebuttable presumption that the trial judge considered all of the record evidence unless the judge specifically states otherwise, the Board found that he could not have not considered all of the evidence, because:

> there must be some basis in the record that would permit a reasonable, disinterested person to fairly question whether the Judge considered the record evidence. [That] presumption can be rebutted when a party can point to significant record evidence that runs contrary to the Judge's findings and conclusions, and which -- as a matter of common sense or practical reasoning -- should have been explicitly acknowledged and expressly taken into account in order for the Judge's analysis to be reasonable and not arbitrary or capricious.

The Board concluded that since the trial judge focused on the evidence of the friendly nature of U.S./Taiwan relations and failed to mention or discuss the contrary evidence, given the totality of the evidence and the judge's failure to articulate a rational basis for his conclusion, he must have evaluated the case in a "piecemeal manner."

On the other hand, where the trial judge did not recite all of the evidence positive to the applicant, and discussed only the testimony at the hearing, the Board concluded that the judge's review of the record was "a piecemeal analysis which is not consistent with the whole person concept".[115] While acknowledging that the trial judge recited favorable elements of applicant's background, the Board held that the trial judge did not discuss or explain how they addressed the security concerns and, therefore, the judge failed to articulate a rational basis for his conclusion.

In another case, where applicant's parents and sister were citizens and residents of China, the Board held that the judge's decision that the applicant would not be subject to influence and pressure was arbitrary, capricious, and without rational basis.[116] Despite the trial judge's favorable decision based on applicant's testimony that she would not succumb to any attempt by a foreign government to induce her to compromise classified information and despite the corroboration of her testimony, the Board found that was not, "considering the record as a whole, sufficient grounds to affirm."

In a case where applicant's mother and two sisters lived in Iran, the Board held that the "totality of the record evidence concerning applicant's contacts with his immediate family" was not sufficient to rebut the presumption of a close relationship.[117]

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[115] ISCR Case No. 02-22461 (Oct. 27, 2005).

[116] ISCR Case No. 02-15339 (Apr. 29, 2004). *Accord,* ISCR Case No. 02-20365 (May 27, 2005)(Relatives in Lebanon).

[117] ISCR Case No. 02-02195 (April 9, 2004).

10. Errors of Law

There are cases, though not many, where the Appeal Board does reverse for purely legal error and those cases are generally remanded to the trial judge to correct the error. An example of this is where the Board reversed a favorable decision under Guideline D, Sexual Conduct, holding that as a matter of law, applicant's masturbating in his car was sexual behavior within the meaning of the Guideline. The Board held that applicant's conduct did not exhibit "clear evidence of rehabilitation".[118] Other cases were reversed and remanded where it was unclear which of two versions of the Foreign Influence Guideline applied to the case [119], and where the trial judge relied on a superceded version of the Adjudicative Guidelines[120], and where there were documents missing from the record.[121]

An unfavorable decision in a case involving an alleged falsification of a security clearance application was reversed and remanded when the judge at the hearing stated that he saw no intent to deceive, but later, without offering an explanation for changing his ruling, found falsification in his written decision.[122] In other cases there were hand written, material changes to the original transcript of which neither party was aware when filing their appeal[123], or exhibits were missing from the record.[124]

Yet another case was reversed and remanded because the trial judge had made remarks on the record which the Board held, a reasonable person could conclude were biased and prejudiced.[125] The Board also overruled a decision granting a clearance even though the applicant held and used

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118 ISCR Case No. 02-29035 (Sept. 26, 2005).

119 ADP Case No. 03-21205 (Dec. 23, 2005).

120 ISCR Case No. 02-17369 (May 23, 2006).

121 ISCR Case No. 04-07825 (Jan. 18, 2006).

122 ISCR Case. No. 02-28917 (Jun. 10, 2005). Cf, ISCR Case No. 02-22883 (Jan. 19, 2006).

123 ISCR Case No. 03-11420 (Oct. 5, 2005). *Accord*, ISCR Case No. 02-28915 (Mar. 3, 2006).

124 ISCR Case No. 02-24875 (Mar. 29, 2006)(relatives in Laos).

125 ISCR Case No. 03-14052 (Sept. 28, 2005).

an Iranian passport. The Board said the trial judge could not use an "overall common sense determination" to override the legal requirements of the "Money Memorandum."[126]

CONCLUSION

In reviewing the DOHA Appeal Board decisions since January 2000 one finds that its standards of appellate review are so vague and elastic that the Board can and does reverse or sustain virtually any decision of a DOHA administrative trial that fits its view of the facts, or despite the facts. The Appeal Board will depart from its frequently stated standards of appellate review to reach a decision that appears to simply substitute its judgment for that of the trial judge. It has done this with some frequency, but almost without fail in one category of cases, those of applicants with contacts or relatives in, or other ties to foreign countries. In the six and one-half years reviewed, the Appeal Board, in cases involving a foreign connection, has affirmed all (144) of applicants' appeals of decisions involving foreign countries denying a clearance, and reversed all but four (45) of the government's appeals of such decisions granting a clearance. In only one of those four cases did the applicant have immediate family living in a foreign country and in that case the Board could not reverse because the government did not appeal on that issue.

While Department Counsel, the prosecution branch of DOHA, does not appeal all trial judge decisions granting a clearance in a foreign connection case, it does appear to focus its appeals on cases involving Middle Eastern countries including Israel, and the Far East countries including China, South Korea and Taiwan. To Department Counsel's credit, it does not appeal all such favorable decisions, however its reasons for appealing some but not others remains a mystery which can only be answered by that Office. If Department Counsel does appeal a favorable Foreign Influence decision, it is assured that the Appeal Board will reverse. Just as assuredly, if an applicant appeals a decision denying a clearance involving a foreign family relation, the Appeal Board will affirm. This apparently unwritten policy of the Department of Defense is a trap for the unwary applicant. Whether the three members of the DOHA Appeal Board are acting independently, which seems unlikely, or are acting on direction from higher Department of Defense authority is not known, but if there is such a policy, it should be published to put applicants on notice that if they appeal the denial of a clearance involving a foreign connection, or the government appeals the grant of such a clearance, any hope for success at the Appeal Board is virtually nonexistent.

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126 ISCR Case No. 03-16516 (Nov. 26, 2004).

Appendix A
DOHA Appeal Board Decisions, Jan. 2000 to May, 2006

CATEGORY	DENIAL AFF'D	DENIAL REV'D	GRANT AFF'D	GRANT REV'D
For. Inf./Pref.	144	0	4	45
Alcohol	51	0	4	6
Pers. Conduct	107	1	10	12
Drugs	58	4	4	6
Financial	115	0	5	6
Criminal	103	0	0	6
Security	6	0	0	0
Sex Offenses	15	0	1	0
Outside Act.	1	1	0	0
Infoma. Syst.	2	0	1	1
SUBTOTAL	716	6	29	82
Remand				
For. Inf./ Pref.	14			
Alcohol	3			
Pers Conduct	6			
Drugs	3			
Financial	6			
Criminal	18			
Sex Offenses	1			
Other	14			
SUBTOTAL	65			
GRAND TOTAL	898			

Appendix B
DOHA APPEAL BOARD REVERSAL AND REMAND DECISIONS, 2000 - MAY 2006

CASE NO.	DATE	GRANT REV	GRANT AFF	DEN REV	REMAND	TYPE	GUIDELINE	COUNTRY	TRIAL JDG.
99-0254	02/16/00	X				FI / FP	B, C	?	METZ
99-0480	11/28/00	X				FI / FP	B, C	?	HEINY
99-0295	10/20/00	X				FI / FP	B, C	?	MATCHINSKI
99-0452	03/21/00		X			FI / FP	B, C	ISRAEL	GALES
99-0597	12/13/00	X				FI / FP	B, C	U.K.	BRAEMAN
01-06166	10/25/01	X				PERS. CON	E, K		ERCK
99-0532	02/27/01	X				FI / FP	B, C	?	ROSS
99-0424	02/08/01	X				FI / FP	B, C	?	CEFOLA
00-0620	10/19/01	X				CRIMINAL	J, G, E		HEINY
99-0228	03/12/01	X				INFOTECH	M, E		ERCK
99-0601	01/30/01	X				FI / FP	B, C	?	SAX
01-22403	09/05/02	X				ALCOHOL	G, E		ERCK
01-21285	09/12/02	X				DRUGS	H		METZ
01-26893	10/16/02	X				FI / FP	B, C	IRAN	SAX
01-17496	10/28/02	X				FI / FP	B, C	ISRAEL	HEINY
01-06870	09/13/02	X				PERS. CON	E, J		ERCK
01-07657	08/29/02	X				FINANCIAL	F		WESLEY
01-05139	08/05/02	X				FINANCIAL	F		TESTAN
01-03132	08/08/02	X				PERS. CON	E		SMITH
01-03107	08/27/02				X	PERS. CON	E, M		SAX
00-0628	04/26/02				X	FI / FP	B, C	SWEDEN	HEINY
00-0317	03/29/02	X				FI / FP	B, C	YUGOSLAVIA	WESLEY
00-0713	02/15/02	X				FINANCIAL	F		BRAEMAN
00-0484	02/01/02	X				FI / FP	B, C	?	MASON
01-03695	10/06/02	X				FINANCIAL	F, E, J		BRAEMAN
02-26826	11/12/03	X				FI / FP	B, C	TURKEY	CEFOLA
02-12329	12/18/03	X				CRIMINAL	J, E		MALONE
02-06478	12/15/03				X	FI	B	CHINA	WILLMETH
02-05988	12/18/03	X				FI	B, E, L	RUSSIA	MATCHINSKI
01-20908	11/26/03	X				FI / FP	B, C	IRAN	SMITH
02-04455	07/31/03				X	FI / FP	B, C	S. KOREA	METZ
01-12350	07/23/03	X				DRUGS			TESTAN
02-04786	06/27/03	X				FI / FP	B, C	IRAN	METZ
01-16419	03/19/03	X				FI / FP	B, C	EGYPT	HEINY
01-20906	01/10/03	X				FI	B, G	LEBANON	ERCK
01-02407	01/13/03	X				CRIMINAL	J, D, E		CEFOLA
00-0628	02/24/03	X				FI / FP	B, C, L	SWEDEN	HEINY0
3-16516	11/26/04	X				FI / FP	B, C	IRAN	GALES
02-24254	06/29/04	X				FI / FP	B, C	SYRIA	LEONARD
02-20110	06/03/04	X				DRUGS	H		WESLEY
03-02486	08/31/04	X				DRUGS	H		ABLARD
02-14995	07/26/04	X				FI / FP	B, C	IRAN	ABLARD

CASE NO.	DATE	GRANT REV	GRANT AFF	DEN REV	REMAND	TYPE	GUIDELINE	COUNTRY	TRIAL JDG.
02-11454	06/07/04	X				ALCOHOL	G		MOGUL
02-15339	04/29/04	X				FI / FP	B, C	CHINA	BRAEMAN
02-02195	04/09/04	X				FI	B, C	IRAN	HEINY
01-24358	04/13/04	X				FI	B, E, K	CHINA	ABLARD
02-18668	02/10/04	X				FI	B, E, K	TAIWAN	TESTAN
02-00318	02/25/04	X				FI / FP	B, C	IRAN	SMITH
00-30929	01/07/04		X			FI	B	S. KOREA	BRAEMAN
02-20365	11/02/04				x	FI / FP	B, C	LEBANON	BEARD
02-20031	08/24/04				x	FI	B	S. KOREA	HOWE
04-05317	06/03/05	X				FI / FP	B, C	LIBYA	CREAN
03-24933	07/28/05	X				FI / FP	B, C	SYRIA	GALES
03-24356	09/19/05		X			PERS CON	E		ABLARD
03-24333	10/12/05	X				PERS CON	E		ABLARD
03-22912	12/30/05		X			ALCOHOL	G, J, C		YOUNG
03-16848	08/30/05	X				FI	B	TAIWAN	RICCARDIELLO
03-15485	06/02/05	X				FI / FP	B, C	ISRAEL	BRAEMAN
03-07874	07/07/05	X				ALCOHOL	G		TESTAN
02-31154	09/22/05	X				FI / FP	B, C	TAIWAN	BRESLIN
02-26915	08/04/05	X				ALCOHOL	G		LEONARD
02-29035	09/26/05	X				ALCOHOL	G		SAX
02-28917	06/10/05			X		FINANCIAL	F, E		SAX
02-23860	06/30/05	X				FI	B	TAIWAN	BRAEMAN
02-24627	05/24/05	X				FI	B	TAIWAN	BRAEMAN
02-20365	05/27/05	X				FI / FP	B, C	LEBANON	ABLARD
02-13595	05/10/05	X				FI / FP	B, C, E	IRAN	HOWE
02-12789	05/13/05			X		PERS CON	E		YOUNG
03-15205	01/21/05	X				FI	B	IRAN	LEONARD
03-11096	02/03/05		X			FI / FP	B, C,L	ISRAEL	LAZZARO
03-02382	02/15/05	X				FI	B, C	IRAN	BRAEMAN
01-10128	01/06/05	X				FI / FP	B, C	CHINA	WESLEY
02-22461	10/27/05	X				FI / FP	B	TAIWAN	LAZZARO
03-11765	04/11/05	X				FI / FP	B, C	ISRAEL	BRAEMAN
03-21220	08/24/05	X				ALCOHOL	G,H,I,E		ABLARD
03-21927	12/30/05				x	FI / FP	B, C	SAUDI	BRESLIN
03-11420	10/05/05				x	FI / FP	B, C	SUDAN	BRESLIN
03-10452	09/28/05				x	FI	B, L	INDIA	ABLARD
03-21205					x	FI	B	?	BRESLIN
04-09959	05/19/06	X				FINANCIAL	F, E		SAX
04-10671	05/01/06		X			FINANCIAL	F, E		FOREMAN
04-07825	01/18/06				X	ALCOHOL	G		HOWE
04-06564	05/30/06		X			FI	B	CHINA	HENRY
04-02928	02/15/06		X			FINANCIAL	F		WILLIAMS
04-02233	05/09/06	X				FI	B	CHINA	BRUCE

CASE NO.	DATE	GRANT REV	GRANT AFF	DEN REV	REMAND	TYPE	GUIDELINE	COUNTRY	TRIAL JDG.
03-27170	05/05/06	X				DRUGS	A, G, D, E, J		CEFOLA
03-23511	02/15/06		X			FINANCIAL	F		ROSS
03-22883	01/19/06				X	CRIMINAL	J, H, E		MOGUL
03-22819	03/20/06	X				PERS. CON	E, J		BRESLIN
03-22563	03/08/06	X				CRIMINAL	J, E		BRAEMAN
03-19101	01/31/06				X	FI / FP	B, C	ISRAEL	BRAEMAN
03-17620	04/17/06				X	FI	B	S. KOREA	GRAHAM
03-16167	01/17/06				X	PERS. CON	E		RICCARDELLO
03-10955	05/30/06	X				FI	B	CHINA	HENRY
03-09212	05/10/06			X		SEC BEHAV	D, E		METZ
03-09053	03/29/06	X				FI	B	CHINA	MASON
03-06212	01/17/06				X	FINANCIAL	F		SAX
03-04300	02/16/06	X				FI / FP	B, C	RUSSIA, ISR.	BRAEMAN
03-02374	01/26/06		X			DRUGS	H		WILLMETH
02-33714	02/22/06				X	CRIMINAL	J, E		ABLARD
02-28915	03/03/06				X	FINANCIAL	F, E		BRAEMAN
02-27870	02/15/06		X			INFO. TECH	M		GALES
02-24875	03/29/06				X	FI	B	LAOS	METZ
02-17369	05/23/06				X	FI	B	JORDAN	GALES
02-12199	04/03/06		X			SEX BEHAV	D		YOUNG
02-03186	02/16/06				X	ALCOHOL	G		SAX
	TOTAL	70	12	3	19				